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# SELECT NATIONAL VENTURE CAPITAL ASSOCIATION MODEL LEGAL DOCUMENTS

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<b><u>DOCUMENT INDEX</u></b>	<b><u>TAB</u></b>
<a href="#">Voting Agreement</a> .....	1
<a href="#">Term Sheet</a> .....	2
<a href="#">Stock Purchase Agreement</a> .....	3
<a href="#">Right of First Refusal and Co-Sale Agreement</a> .....	4
<a href="#">Investors' Rights Agreement</a> .....	5

This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.

## [AMENDED AND RESTATED] VOTING AGREEMENT

THIS [AMENDED AND RESTATED] VOTING AGREEMENT (this “**Agreement**”) is made and entered into as of [\_\_\_\_], 20[\_\_\_\_], by and among [\_\_\_\_], a [Delaware] corporation (the “**Company**”), each holder of the Series A Preferred Stock, \$[\_\_\_\_] par value per share, of the Company (“**Series A Preferred Stock**”), [and Series B Preferred Stock, \$[\_\_\_\_] par value per share, of the Company (“**Series B Preferred Stock**”),] (referred to herein [collectively with the Series A Preferred Stock,] as the “**Preferred Stock**”) listed on Schedule A (together with any subsequent investors, or transferees, who become parties hereto as “**Investors**” pursuant to Sections 7.1(a) or 7.2 below, the “**Investors**”), and those certain stockholders of the Company [and holders of options to acquire shares of the capital stock of the Company] listed on Schedule B (together with any subsequent stockholders [or option holders], or any transferees, who become parties hereto as “**Key Holders**” pursuant to Section[s] 7.1(b) or 7.2 below, the “**Key Holders**,”<sup>1</sup> and together collectively with the Investors, the “**Stockholders**”).

### RECITALS

[*Alternative 1:*<sup>2</sup> A. Concurrently with the execution of this Agreement, the Company and the Investors are entering into a Series A Preferred Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Series A Preferred Stock, and in connection with that agreement the parties desire to provide the Investors with the right, among other rights, to designate the election of certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.<sup>3</sup>]

[*Alternative 2:*<sup>4</sup> A. Concurrently with the execution of this Agreement, the Company and certain of the Investors are entering into a Series B Preferred Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Series B Preferred Stock. Certain of the Investors (the “**Existing Investors**”) and the Key Holders are parties to that certain Voting Agreement dated [\_\_\_\_] by and among the Company and the parties thereto (the “**Prior Agreement**”). The Company, the Key Holders and the Existing Investors party to the Prior Agreement desire to amend and restate that agreement to provide those Investors purchasing shares of the Series B Preferred Stock pursuant to the Purchase Agreement with the right, among other

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<sup>1</sup> In most cases investors will want the term “Key Holders” to include holders of significant quantities of common stock or options in addition to the individuals who actually founded the Company.

<sup>2</sup> The first alternative for the recital paragraph A assumes that the agreement concerns the sale of the Company’s first series of preferred stock.

<sup>3</sup> Section 706(a) of the California General Corporation Law and Section 218(c) of the Delaware General Corporation Law (the “**DGCL**”) specifically allow voting agreements between stockholders, provided such agreements are in writing and signed by the parties thereto. The powers created by these sections are not limited to board matters.

<sup>4</sup> The second alternative for recital paragraph A assumes that a preexisting voting agreement is being superseded. It contemplates two (2) or more different series of preferred stock. In the remainder of this Agreement, brackets indicate places where the drafter will have to take account of the existence of multiple series.

rights, to elect certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.]

B. The Amended and Restated Certificate of Incorporation of the Company (as the same may be amended and/or restated from time to time, the “**Restated Certificate**”) provides that (a) the holders of record of the shares of the [Series A] Preferred Stock, exclusively and as a separate class, shall be entitled to elect [\_\_\_] director[s] of the Company (the “[**Series A**][**Preferred**] **Director[s]**”) [and the holders of record of the shares of Series B Preferred Stock, exclusively and as a separate class, shall be entitled to elect [\_\_\_] director[s] of the Company (the “**Series B Director[s]**”)]; [(b) the holders of record of the shares of common stock, \$[\_\_\_] par value per share, of the Company (“**Common Stock**”), exclusively and as a separate class, shall be entitled to elect [\_\_\_] directors of the Company (the “**Common Director[s]**”);] and (c) the holders of record of the shares of Common Stock and the Preferred Stock, voting together as a single class on an as converted basis, shall be entitled to elect the balance of the total number of directors of the Company.<sup>5</sup>

[C. The parties also desire to enter into this Agreement to set forth their agreements and understandings with respect to how shares of the capital stock of the Company held by them will be voted on, or tendered, in connection with, an acquisition of the Company and voted on in connection with an increase in the number of shares of Common Stock required to provide for the conversion of the Preferred Stock.]

NOW, THEREFORE, [the Existing Investors hereby agree that the Prior Agreement is hereby amended and restated in its entirety by this Agreement, and] the parties [further] agree as follows:

1. Voting Provisions Regarding the Board.<sup>6</sup>

1.1 Shares. For purposes of this Agreement, the term “**Shares**” shall mean and include any securities of the Company that the holders of which are entitled to vote for members of the Board, including, without limitation, all shares of Common Stock and [Series A] Preferred Stock, by whatever name called, now owned or subsequently acquired by a Stockholder, however acquired, whether through stock splits, stock dividends, reclassifications, recapitalizations, similar events or otherwise.

1.2 Board Composition.<sup>7</sup> Each Stockholder agrees to vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that at each annual or special meeting of stockholders at which an election of directors is held or pursuant to any

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<sup>5</sup> Appropriate modifications to this form will be required to reflect the actual series of preferred stock outstanding and the relative rights of such series.

<sup>6</sup> Careful consideration should be given to ensure that the voting agreement does not contradict class or series votes created by the Certificate of Incorporation. In addition, especially for California corporations, consider the effects that cumulative voting may have on the class and series votes created by the Certificate of Incorporation.

<sup>7</sup> Drafters should be mindful that the total number of directors will generally be determined by the Company’s bylaws (which typically allow the board to establish the size of the board), as well as any protective provisions set forth in the Certificate of Incorporation regarding increasing/decreasing the board size.

written consent of the stockholders, subject to Section 5, the following persons shall be elected to the Board:<sup>8</sup>

(a) [As the [first Preferred][Series A] Director, one] [One] person designated from time to time by [*Name of Investor*] (the “[*Name of Investor*] **Designee**”), for so long as such Stockholder and its Affiliates (as defined below) continue to own beneficially an aggregate of at least [\_\_\_\_\_] shares of Common Stock (including shares of Common Stock issued or issuable upon conversion of the Preferred Stock), which number is subject to appropriate adjustment for any stock splits, stock dividends, combinations, recapitalizations and the like, which individual shall initially be [\_\_\_\_\_];

(b) [[As the [second Preferred][Series B] Director, one] [One] person designated from time to time by [*Name of 2d Investor*] (the “[*Name of 2d Investor*] **Designee**”), for so long as such Stockholder and its Affiliates continue to own beneficially an aggregate of at least [\_\_\_\_\_] shares of Common Stock (including shares of Common Stock issued or issuable upon conversion of the Preferred Stock), which number is subject to appropriate adjustment for any stock splits, stock dividends, combinations, recapitalizations and the like, which individual shall initially be [\_\_\_\_\_];]

(c) [As one Common Director] [*Alternative 1*: For so long as the Key Holders [who are then providing services to the Company as officers, employees or consultants] hold an aggregate of at least [\_\_\_\_\_] shares of Common Stock (subject to appropriate adjustment for any stock splits, stock dividends, combinations, recapitalizations and the like), one individual designated from time to time by the holders of a majority of the shares of Common Stock [outstanding][held by the Key Holders] [who are then providing services to the Company as officers, employees or consultants], which individual shall initially be [\_\_\_\_\_];]

[*Alternative 2*: [*name of Key Holder*], for so long as [*name of Key Holder*] [remains an [officer] [employee] of the Company] [holds at least [\_\_\_\_\_] shares of Common Stock (subject to appropriate adjustment for any stock splits, stock dividends, combinations, recapitalizations and the like)] [holds at least [\_\_\_\_\_] % of the outstanding capital stock of the Company on an as converted basis] [, except that if [*name of Key Holder*] declines or is unable to serve, his or her successor shall be designated by [*name of alternate Key Holder*] [the holders of a majority of the shares of Common Stock outstanding]]];<sup>9</sup>

(d) [As [the other] [the] Common Director] [T]he Company’s Chief Executive Officer, who as of the date of this Agreement is [\_\_\_\_\_] (the “**CEO Director**”), provided that if for any reason the CEO Director shall cease to serve as the Chief Executive Officer of the Company, each of the Stockholders shall promptly vote their respective Shares (i) to remove

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<sup>8</sup> The number of permutations of board composition are almost limitless. Some of the more common requirements are set forth in Section 1.2.

<sup>9</sup> Careful consideration should be given whenever an individual is named to serve as a director who may have the ability to continue to serve at his or her pleasure. Alternative 1 provides that a founder director shall be elected by the majority of the Key Holders’ shares or the shares of common stock, depending upon which alternative is selected, but in fact the designated founder may have sufficient shares of stock to control that vote. Alternative 2 has a variety of choices: the first ties the board seat to continued status as an officer or employee, which may be within the control of the majority of the board of directors; the other alternatives tie the right to designate a director only to continued minimum holdings of stock.

the former Chief Executive Officer of the Company from the Board if such person has not resigned as a member of the Board; and (ii) to elect such person's replacement as Chief Executive Officer of the Company as the new CEO Director; and

(e) [As the Mutual Director, one] [One] individual not otherwise an Affiliate of the Company or of any Investor who is [mutually acceptable to (i) the holders of a majority of the Shares held by the Key Holders who are then providing services to the Company as officers, employees or consultants; and (ii) the holders of a majority of the Shares held by the Investors] [mutually acceptable to the other members of the Board]; and

To the extent that any of clauses (a) through [(e)] above shall not be applicable, any member of the Board who would otherwise have been designated in accordance with the terms thereof shall instead be voted upon by all the Stockholders of the Company entitled to vote thereon in accordance with, and pursuant to, the Restated Certificate.

For purposes of this Agreement, an individual, firm, corporation, partnership, association, limited liability company, trust or any other entity (collectively, a "**Person**") shall be deemed an "**Affiliate**" of another Person who, directly or indirectly, controls, is controlled by or is under common control with such Person, including, without limitation, any general partner, managing member, officer, director or trustee of such Person, or any venture capital fund or registered investment company now or hereafter existing that is controlled by one (1) or more general partners, managing members or investment advisers of, or shares the same management company or investment adviser with, such Person.

1.3 Failure to Designate a Board Member. In the absence of any designation from the Persons or groups with the right to designate a director as specified above, the director previously designated by them and then serving shall be reelected if willing to serve unless such individual has been removed as provided herein, and otherwise such Board seat shall remain vacant until otherwise filled as provided above.

1.4 Removal of Board Members.<sup>10</sup> Each Stockholder also agrees to vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that:

(a) no director elected pursuant to Section 1.2 of this Agreement may be removed from office [other than for cause] unless (i) such removal is directed or approved by the affirmative vote of the Person(s), or of the holders of at least [*specify percentage*] of the shares of stock, entitled under Section 1.2 to designate that director;<sup>11</sup> or (ii) the Person(s) originally

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<sup>10</sup> Note the importance of following the formalities for resignations and removals of directors to ensure the valid composition of the board of directors. For example, if a director who wishes to resign simply ceases to act as a director but does not tender his resignation to the Company or is not properly removed from the board of directors, he or she will continue to be a director. Accordingly, written consents that do not include his or her signature will likely not be considered unanimous and, therefore, be ineffective. Moreover, if the director does not properly resign, a vacancy may not exist that the remaining directors are able to fill.

<sup>11</sup> Alternatively, the agreement can enumerate the identity of each group whose consent is necessary to remove each director, but care should be given to ensure that the consent requirements conform to the exact subsets entitled to

entitled to designate or approve such director [or occupy such Board seat] pursuant to Section 1.2 is no longer so entitled to designate or approve such director [or occupy such Board seat];

(b) any vacancies created by the resignation, removal or death of a director elected pursuant to Section 1.2 shall be filled pursuant to the provisions of this Section 1;<sup>12</sup> and

(c) upon the request of any party entitled to designate a director as provided in Section 1.2 to remove such director, such director shall be removed.<sup>13</sup>

All Stockholders agree to execute any written consents required to perform the obligations of this Section 1, and the Company agrees at the request of any Person or group entitled to designate directors to call a special meeting of stockholders for the purpose of electing directors. [So long as the stockholders of the Company are entitled to cumulative voting, if less than the entire Board is to be removed, no director may be removed without cause if the votes cast against his or her removal would be sufficient to elect such director if then cumulatively voted at an election of the entire Board.]

1.5 No Liability for Election of Recommended Directors. No Stockholder, nor any Affiliate of any Stockholder, shall have any liability as a result of designating a person for election as a director for any act or omission by such designated person in his or her capacity as a director of the Company, nor shall any Stockholder have any liability as a result of voting for any such designee in accordance with the provisions of this Agreement.

2. Vote to Increase Authorized Common Stock. Each Stockholder agrees to vote or cause to be voted all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to increase the number of authorized shares of Common Stock from time to time to ensure that there will be sufficient shares of Common Stock available for conversion of all of the shares of Preferred Stock outstanding at any given time.

3. [Drag-Along Right].<sup>14</sup>

3.1 Definitions. A “**Sale of the Company**” shall mean either: (a) a transaction or series of related transactions in which a Person, or a group of related Persons, acquires from

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designate directors, *e.g.*, “the holders of a majority of the Shares held by the Key Holders who are then providing services to the Company as officers, employees or consultants.”

<sup>12</sup> For flexibility reasons it may be useful to permit the Board to fill the vacancy in addition to the right of the stockholders to do so. If so, the drafter should provide that the person to fill the vacancy must be approved by the Person who has the right to nominate that director pursuant to this Voting Agreement, and should take care that the provision is in accord with the Certificate of Incorporation, the bylaws and the applicable corporations code. See Section 223 of the DGCL or Section 305 of the DGCL.

<sup>13</sup> Note that a director who is designated by agreement of multiple parties can be removed only by the consent of each of those parties, unless this form has been revised to provide otherwise.

<sup>14</sup> A drag-along right gives a defined group of stockholders the right to deliver all (or most) of the shares of a Company without the need of effecting a freeze-out merger. The drafter should be mindful of the interplay between this provision and minority protections against changes in control that may be in the Certificate of Incorporation or the Investor Rights Agreement. Drag-along rights are less common than voting agreements regarding the composition of the board of directors, which are near universal. While drag-along agreements are not universal, it is arguable that

stockholders of the Company shares representing more than fifty percent (50%) of the outstanding voting power of the Company (a “**Stock Sale**”); or (b) a transaction that qualifies as a “**Deemed Liquidation Event**” as defined in the Restated Certificate.

3.2 Actions to be Taken. In the event that (i) the holders of at least [*specify percentage*] of the shares of [Common Stock then issued or issuable upon conversion of the shares of] Preferred Stock (the “**Selling Investors**”); [(ii) the Board;]<sup>15</sup> and [(iii) the holders of a majority of the then outstanding shares of Common Stock [(other than those issued or issuable upon conversion of the shares of [Series A] Preferred Stock)]] held by Key Holders who are then providing services to the Company as officers, employees or consultants voting as a separate class [(collectively, (i)-(ii[i]) are the “**Electing Holders**”)] approve a Sale of the Company (which approval of the Electing Holders must be in writing), specifying that this Section 3 shall apply to such transaction, then, subject to satisfaction of each of the conditions set forth in Section 3.3 below, each Stockholder and the Company hereby agree:<sup>16</sup>

(a) if such transaction requires stockholder approval, with respect to all Shares that such Stockholder owns or over which such Stockholder otherwise exercises voting power, to vote (in person, by proxy or by action by written consent, as applicable) all Shares in favor of, and adopt, such Sale of the Company [(together with any related amendment or restatement to the Restated Certificate required to implement such Sale of the Company)] and to vote in opposition to any and all other proposals that could [reasonably be expected to] delay or impair the ability of the Company to consummate such Sale of the Company;

(b) if such transaction is a Stock Sale, to sell the same proportion of shares of capital stock of the Company beneficially held by such Stockholder as is being sold by the Selling Investors to the Person to whom the Selling Investors propose to sell their Shares, and, except as permitted in Section 3.3 below, on the same terms and conditions as the other stockholders of the Company;

(c) to execute and deliver all related documentation and take such other action in support of the Sale of the Company as shall reasonably be requested by the Company or the Selling Investors in order to carry out the terms and provision of this Section 3, including, without limitation, executing and delivering instruments of conveyance and transfer, and any

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a drag-along with a high voting percentage trigger is in the best interests of all parties. If so structured (and note that multiple voting constituencies can be defined as appropriate, such as all preferred together and/or each separate series, or all non-investor common and/or common held by existing management and employees), the objective of the drag-along is not to grant the investors the unilateral right to force a sale, but rather to ensure that all (or most) of the Company’s stockholders will approve a transaction approved by holders of a specified percentage of the Company’s stockholders. The voting rights of each group of constituents can be protected, while helping to prevent dissent by minority “cat and dog” stockholders. In this connection, it is important to note that many acquirers in M&A transactions will require the seller to deliver a certain percentage of the vote (or, stated differently, seek to reduce the risk of stockholders exercising appraisal rights). If such a “housekeeping” drag-along is included in the Voting Agreement, the Company should include similar provisions, and a waiver of dissenter’s rights, in its form of employee option agreements.

<sup>15</sup> See footnote 55 (Addendum) for a discussion of why the drafters might elect not to include the board of directors as one of the parties necessary to trigger the drag-along, in light of the *Trados* decision.

<sup>16</sup> Careful attention should be paid to the drafting as to what comprises the votes necessary to trigger the drag, including ensuring they do not conflict with the protective provisions, etc.

purchase agreement, merger agreement, any associated indemnity agreement, or escrow agreement, any associated voting, support, or joinder agreement, consent, waiver, governmental filing, share certificates duly endorsed for transfer (free and clear of impermissible liens, claims and encumbrances), and any similar or related documents;

(d) not to deposit, and to cause their Affiliates not to deposit, except as provided in this Agreement, any Shares of the Company owned by such party or Affiliate in a voting trust or subject any Shares to any arrangement or agreement with respect to the voting of such Shares, unless specifically requested to do so by the acquirer in connection with the Sale of the Company;

(e) to refrain from (i) exercising any dissenters' rights or rights of appraisal under applicable law at any time with respect to such Sale of the Company<sup>17</sup>, or [(ii); asserting any claim or commencing any suit [(x)] challenging the Sale of the Company or this Agreement, or [(y) alleging a breach of any fiduciary duty of the Selling Investors or any affiliate or associate thereof (including, without limitation, aiding and abetting breach of fiduciary duty) in connection with the evaluation, negotiation or entry into the Sale of the Company, or] the consummation of the transactions contemplated thereby;]<sup>18</sup>

(f) if the consideration to be paid in exchange for the Shares pursuant to this Section 3 includes any securities and due receipt thereof by any Stockholder would require under applicable law (x) the registration or qualification of such securities or of any person as a broker or dealer or agent with respect to such securities; or (y) the provision to any Stockholder of any information other than such information as a prudent issuer would generally furnish in an offering made solely to "accredited investors" as defined in Regulation D promulgated under the Securities Act of 1933, as amended (the "**Securities Act**"), the Company may cause to be paid to any such Stockholder in lieu thereof, against surrender of the Shares which would have otherwise been sold by such Stockholder, an amount in cash equal to the fair value (as determined in good

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<sup>17</sup> An express waiver of appraisal rights is particularly important in light of the Delaware Chancery Court's ruling in *Riverstone National Inc. v. Caplan et. al*, Case No. C.A. 9796-NVCG (Del Ch. Feb. 26, 2015). In *Riverstone*, a corporation's ninety-one percent (91%) controlling stockholder approved a merger of the corporation by written consent. When a group of minority stockholders sought statutory appraisal rights, the controlling stockholder purported to exercise drag-along rights contained in a stockholders agreement signed by the minority stockholders that contained an agreement to vote their shares in favor of the merger, but not an express waiver of appraisal rights. The Court ruled that because the drag-along in question was limited to a voting agreement (which if enforced would have resulted in a waiver of appraisal rights), the drag-along was only operative and enforceable prior to the merger's becoming effective. Once the merger was effective, the voting agreement had terminated; the minority stockholders who had not voted in favor of the merger were no longer obligated to vote and thus could exercise their appraisal rights. Importantly, the Court did not decide whether common stockholders can waive statutory appraisal rights in advance through a contractual drag-along provision, so the efficacy of this provision is not certain. Including it, however, provides an argument that appraisal rights have been extinguished even if the drag-along and related voting agreement are not implemented in connection with a merger.

<sup>18</sup> Even if appraisal rights are waived, common and subordinate preferred stockholders are increasingly filing breach of fiduciary duty claims seeking quasi-appraisal – *i.e.*, damages that mirror the recovery available in an appraisal suit – in transactions subject to drag-along provisions where the junior preferred or common shareholders are to receive no consideration for their shares. Because the directors are often representatives of the senior preferred holders, these suits are difficult to dismiss at an early stage. Accordingly, consideration should be given to expanding the agreement to include an agreement not to file appraisal actions to cover breach of fiduciary suits in transactions subject to the drag along.

faith by the Board) of the securities which such Stockholder would otherwise receive as of the date of the issuance of such securities in exchange for the Shares; and

(g) in the event that the Selling Investors, in connection with such Sale of the Company, appoint a stockholder representative (the “**Stockholder Representative**”) with respect to matters affecting the Stockholders under the applicable definitive transaction agreements following consummation of such Sale of the Company, (x) to consent to (i) the appointment of such Stockholder Representative, (ii) the establishment of any applicable escrow, expense or similar fund in connection with any indemnification or similar obligations, and (iii) the payment of such Stockholder’s pro rata portion (from the applicable escrow or expense fund or otherwise) of any and all reasonable fees and expenses to such Stockholder Representative in connection with such Stockholder Representative’s services and duties in connection with such Sale of the Company and its related service as the representative of the Stockholders, and (y) not to assert any claim or commence any suit against the Stockholder Representative or any other Stockholder with respect to any action or inaction taken or failed to be taken by the Stockholder Representative, within the scope of the Stockholder Representative’s authority, in connection with its service as the Stockholder Representative, absent fraud, bad faith, [gross negligence] or willful misconduct.

3.3 Conditions.<sup>19</sup> Notwithstanding anything to the contrary set forth herein, a Stockholder will not be required to comply with Section 3.2 above in connection with any proposed Sale of the Company (the “**Proposed Sale**”), unless:

(a) any representations and warranties to be made by such Stockholder in connection with the Proposed Sale are limited to representations and warranties related to authority, ownership and the ability to convey title to such Shares, including, but not limited to, representations and warranties that (i) the Stockholder holds all right, title and interest in and to the Shares such Stockholder purports to hold, free and clear of all liens and encumbrances, (ii) the obligations of the Stockholder in connection with the transaction have been duly authorized, if applicable, (iii) the documents to be entered into by the Stockholder have been duly executed by the Stockholder and delivered to the acquirer and are enforceable (subject to customary limitations) against the Stockholder in accordance with their respective terms; and (iv) neither the execution and delivery of documents to be entered into by the Stockholder in connection with the transaction, nor the performance of the Stockholder’s obligations thereunder, will cause a breach or violation of the terms of any agreement to which the Stockholder is a party, or any law or judgment, order or decree of any court or governmental agency that applies to the Stockholder;

(b) such Stockholder is not required to agree (unless such Stockholder is a Company officer or employee) to any restrictive covenant in connection with the Proposed Sale (including, without limitation, any covenant not to compete or covenant not to solicit customers, employees or suppliers of any party to the Proposed Sale) or any release of claims other

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<sup>19</sup> Drafter should assess and make determination as to whether any or all of the listed conditions are appropriate for the relevant transaction. Additional possible conditions that investors might consider include: the liquidity of the consideration payable to security holders in a Proposed Sale; the ability of the parties in the Proposed Sale to change the material terms, including the drag along conditions, after the security holders have approved the Proposed Sale Agreement; the scope of the Stockholder Representative’s authority to bind the security holders to liabilities beyond the escrow; and the extent that security holders could be responsible for out of pocket expenses in the Proposed Sale.

than a release in customary form of claims arising solely in such Stockholder's capacity as a stockholder of the Company;

(c) such Stockholder and its Affiliates are not required to amend, extend or terminate any contractual or other relationship with the Company, the acquirer or their respective Affiliates, except that the Stockholder may be required to agree to terminate the investment-related documents between or among such Stockholder, the Company and/or other stockholders of the Company;

(d) the Stockholder is not liable for the breach of any representation, warranty or covenant made by any other Person in connection with the Proposed Sale, other than the Company [(except to the extent that funds may be paid out of an escrow established to cover breach of representations, warranties and covenants of the Company as well as breach by any stockholder of any of identical representations, warranties and covenants provided by all stockholders)];

(e) liability shall be limited to such Stockholder's applicable share (determined based on the respective proceeds payable to each Stockholder in connection with such Proposed Sale in accordance with the provisions of the Restated Certificate) of a negotiated aggregate indemnification amount that applies equally to all Stockholders but that in no event exceeds the amount of consideration otherwise payable to such Stockholder in connection with such Proposed Sale, except with respect to claims related to fraud by such Stockholder, the liability for which need not be limited as to such Stockholder;

(f) upon the consummation of the Proposed Sale (i) each holder of each class or series of the capital stock of the Company will receive the same form of consideration for their shares of such class or series as is received by other holders in respect of their shares of such same class or series of stock, [and if any holders of any capital stock of the Company are given a choice as to the form of consideration to be received as a result of the Proposed Sale, all holders of such capital stock will be given the same option,]<sup>20</sup> (ii) each holder of a series of Preferred Stock will receive the same amount of consideration per share of such series of Preferred Stock as is received by other holders in respect of their shares of such same series, (iii) each holder of Common Stock will receive the same amount of consideration per share of Common Stock as is received by other holders in respect of their shares of Common Stock, and (iv) unless waived pursuant to the terms of the Restated Certificate and as may be required by law, the aggregate consideration receivable by all holders of the Preferred Stock and Common Stock shall be allocated among the holders of Preferred Stock and Common Stock on the basis of the relative liquidation preferences to which the holders of each respective series of Preferred Stock and the holders of Common Stock are entitled in a Deemed Liquidation Event (assuming for this purpose that the Proposed Sale is a Deemed Liquidation Event) in accordance with the Company's Restated Certificate in effect immediately prior to the Proposed Sale; provided, however, that, notwithstanding the foregoing provisions of this Section 3.3(e), if the consideration to be paid in exchange for the Shares held by the Key Holder or Investor, as applicable, pursuant to this Section 3.3(e) includes any securities and due receipt thereof by any Key Holder or Investor would require under applicable law (x) the registration or qualification of such securities or of any person as a

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<sup>20</sup> This bracketed material is an alternative to 3.3(g).

broker or dealer or agent with respect to such securities; or (y) the provision to any Key Holder or Investor of any information other than such information as a prudent issuer would generally furnish in an offering made solely to “accredited investors” as defined in Regulation D promulgated under the Securities Act, the Company may cause to be paid to any such Key Holder or Investor in lieu thereof, against surrender of the Shares held by the Key Holder or Investor, as applicable, which would have otherwise been sold by such Key Holder or Investor, an amount in cash equal to the fair value (as determined in good faith by the Board) of the securities which such Key Holder or Investor would otherwise receive as of the date of the issuance of such securities in exchange for the Shares held by the Key Holder or Investor, as applicable;

(g) [subject to clause (f) above, requiring the same form of consideration to be available to the holders of any single class or series of capital stock, if any holders of any capital stock of the Company are given an option as to the form and amount of consideration to be received as a result of the Proposed Sale, all holders of such capital stock will be given the same option; provided, however, that nothing in this Section 3.3(g) shall entitle any holder to receive any form of consideration that such holder would be ineligible to receive as a result of such holder’s failure to satisfy any condition, requirement or limitation that is generally applicable to the Company’s stockholders.]

3.4 Restrictions on Sales of Control of the Company.<sup>21</sup> No Stockholder shall be a party to any Stock Sale unless (a) all holders of Preferred Stock are allowed to participate in such transaction(s) and (b) the consideration received pursuant to such transaction is allocated among the parties thereto in the manner specified in the Company’s Restated Certificate in effect immediately prior to the Stock Sale (as if such transaction(s) were a Deemed Liquidation Event), unless the holders of at least the requisite percentage required to waive treatment of the transaction(s) as a Deemed Liquidation Event pursuant to the terms of the Restated Certificate, elect to allocate the consideration differently by written notice given to the Company at least [\_\_\_] days prior to the effective date of any such transaction or series of related transactions.]

[See ADDENDUM at end of this document with alternative “Sale Rights” provisions.]<sup>22</sup>

#### 4. Remedies.

4.1 Covenants of the Company. The Company agrees to use its best efforts, within the requirements of applicable law, to ensure that the rights granted under this Agreement are effective and that the parties enjoy the benefits of this Agreement. Such actions include,

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<sup>21</sup> The reason for this provision is that the Deemed Liquidation Event provisions of the Certificate of Incorporation cannot completely provide for the allocation of the purchase price paid in a sale of the Company if the sale is structured as a sale of stock by the Company’s stockholders. This is because the Company may not be a party to the stock sale transaction and will not have the opportunity to ensure that the purchase price is allocated as dictated in the Certificate of Incorporation. This covenant is intended to prevent a group of controlling stockholders from circumventing the liquidation preference provision by structuring the sale as a stock sale if those stockholders do not otherwise have sufficient voting power to amend the definition of a Deemed Liquidation Event. Co-sale provisions do not provide adequate protection for such a scenario either because (a) the co-sale right does not apply to the holders of preferred stock; or (b) if co-sale rights do apply, the preferred stockholders exercising those rights might receive the same purchase price for their preferred stock as the selling common stockholders receive for this common stock, thereby losing the benefits of their liquidation preferences.

<sup>22</sup> See footnote 55 (Addendum).

without limitation, the use of the Company's best efforts to cause the nomination and election of the directors as provided in this Agreement.

4.2 [Irrevocable Proxy and Power of Attorney]. Each party to this Agreement hereby constitutes and appoints as the proxies of the party and hereby grants a power of attorney to the [President of the Company], and a designee of the Selling Investors, and each of them, with full power of substitution, with respect to the matters set forth herein, including, without limitation, votes regarding the size and composition of the Board pursuant to Section 1, votes to increase authorized shares pursuant to Section 2 hereof and votes regarding any Sale of the Company pursuant to Section 3 hereof, and hereby authorizes each of them to represent and vote, if and only if the party (i) fails to vote, or (ii) attempts to vote (whether by proxy, in person or by written consent), in a manner which is inconsistent with the terms of this Agreement, all of such party's Shares in favor of the election of persons as members of the Board determined pursuant to and in accordance with the terms and provisions of this Agreement or the increase of authorized shares or approval of any Sale of the Company pursuant to and in accordance with the terms and provisions of this Agreement or to take any action reasonably necessary to effect this Agreement. The power of attorney granted hereunder shall authorize [the President of the Company] to execute and deliver the documentation referred to in Section 3.2(c) on behalf of any party failing to do so within five (5) business days of a request by the Company. Each of the proxy and power of attorney granted pursuant to this Section 4.2 is given in consideration of the agreements and covenants of the Company and the parties in connection with the transactions contemplated by this Agreement and, as such, each is coupled with an interest and shall be irrevocable unless and until this Agreement terminates or expires pursuant to Section 6 hereof. Each party hereto hereby revokes any and all previous proxies or powers of attorney with respect to the Shares and shall not hereafter, unless and until this Agreement terminates or expires pursuant to Section 6 hereof, purport to grant any other proxy or power of attorney with respect to any of the Shares, deposit any of the Shares into a voting trust or enter into any agreement (other than this Agreement), arrangement or understanding with any person, directly or indirectly, to vote, grant any proxy or give instructions with respect to the voting of any of the Shares, in each case, with respect to any of the matters set forth herein.]<sup>23</sup>

4.3 Specific Enforcement. Each party acknowledges and agrees that each party hereto will be irreparably damaged in the event any of the provisions of this Agreement are not performed by the parties in accordance with their specific terms or are otherwise breached. Accordingly, it is agreed that each of the Company and the Stockholders shall be entitled to an

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<sup>23</sup> The proxy is intended to give the holder of voting rights a tool to force other stockholders to abide by the terms of this Agreement, even if the other stockholders do not agree or refuse to take the action the holder requires. The Delaware Chancery Court's ruling in *Riverstone* reinforces the importance of having a proxy to vote all shares of the corporation that are not voluntarily voted in favor of a merger so as to extinguish appraisal rights as a matter of law. To achieve that result, however, the proxy must actually be used to vote, at a stockholders meeting or by written consent, all shares in favor of the merger that are not voluntarily voted in favor. Attempts to do so after approval or consummation of a merger will likely be ineffective under *Riverstone*. Note, however, that many stockholders will not give up the right to determine if the actions sought to be taken by the holder of voting rights comport with the terms of this Agreement. There may be a difference of opinion, for example, as to whether a proposed sale of the Company meets all conditions sufficient to fall with the definition of that term. Some practitioners believe the proxy would be unlikely to be used in situations when there is a dispute as to which actions are required, and that any exercise of the proxy could be hazardous to the holder of the right at that time. Accordingly, the proxy may not be very useful in the very situations when it might be invoked.

injunction to prevent breaches of this Agreement, and to specific enforcement of this Agreement and its terms and provisions in any action instituted in any court of the United States or any state having subject matter jurisdiction.

4.4 Remedies Cumulative. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

5. “Bad Actor” Matters.<sup>24</sup>

5.1 Definitions. For purposes of this Agreement:

(a) **“Company Covered Person”** means, with respect to the Company as an “issuer” for purposes of Rule 506 promulgated under the Securities Act, any Person listed in the first paragraph of Rule 506(d)(1).

(b) **“Disqualified Designee”** means any director designee to whom any Disqualification Event is applicable, except for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable.

(c) **“Disqualification Event”** means a “bad actor” disqualifying event described in Rule 506(d)(1)(i)-(viii) promulgated under the Securities Act.

(d) **“Rule 506(d) Related Party”** means, with respect to any Person, any other Person that is a beneficial owner of such first Person’s securities for purposes of Rule 506(d) under the Securities Act.

5.2 Representations.

(a) Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement hereby represents that (i) such Person has exercised reasonable care to determine whether any Disqualification Event is applicable to such Person, any director designee designated by such Person pursuant to this Agreement or any of such Person’s Rule 506(d) Related Parties, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable and (ii) no Disqualification Event is applicable to such Person, any Board member designated by such Person pursuant to this Agreement or any of such Person’s Rule 506(d) Related Parties, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable.<sup>25</sup> Notwithstanding anything to the contrary in this Agreement, each Investor makes no representation regarding any Person that may be deemed to be a beneficial owner of the Company’s voting equity securities held by such Investor

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<sup>24</sup> This provision is intended to permit issuers to conduct Rule 506 offerings based on the assumption that their stockholders are not “bad actors.” The rule does not preclude selling securities to bad actors and, therefore, this representation is not strictly necessary for purposes of the transaction in which an investor becomes a party to this Agreement. However, by determining in advance whether an investor is a bad actor issuers can avoid being precluded from relying on Rule 506 for future offerings or future sales in the same offering if the investor is or becomes a twenty percent (20%) beneficial owner of the issuer’s voting securities.

<sup>25</sup> Although Rule 506(d) does not disqualify issuers for “bad acts” occurring prior to September 23, 2013, this representation addresses “bad acts” both before and after that date. If disclosure of a “bad act” by an investor prior to September 23, 2013 is required, this representation can be modified accordingly.

solely by virtue of that Person being or becoming a party to (x) this Agreement, as may be subsequently amended, or (y) any other contract or written agreement to which the Company and such Investor are parties regarding (1) the voting power, which includes the power to vote or to direct the voting of, such security; and/or (2) the investment power, which includes the power to dispose, or to direct the disposition of, such security.

(b) The Company hereby represents and warrants to the Investors that no Disqualification Event is applicable to the Company or, to the Company's knowledge, any Company Covered Person, except for a Disqualification Event as to which Rule 506(d)(2)(ii)-(iv) or (d)(3) is applicable.

5.3 Covenants. Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement covenants and agrees (i) not to designate or participate in the designation of any director designee who, to such Person's knowledge, is a Disqualified Designee, (ii) to exercise reasonable care to determine whether any director designee designated by such person is a Disqualified Designee, (iii) that in the event such Person becomes aware that any individual previously designated by any such Person is or has become a Disqualified Designee, such Person shall as promptly as practicable take such actions as are necessary to remove such Disqualified Designee from the Board and designate a replacement designee who is not a Disqualified Designee, and (iv) to notify the Company promptly in writing in the event a Disqualification Event becomes applicable to such Person or any of its Rule 506(d) Related Parties, or, to such Person's knowledge, to such Person's initial designee named in Section 1, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable.<sup>26</sup>

6. Term. This Agreement shall be effective as of the date hereof and shall continue in effect until and shall terminate upon the earliest to occur of (a) the consummation of the Company's first underwritten public offering of its Common Stock<sup>27</sup> (other than a registration statement relating either to the sale of securities to employees of the Company pursuant to its stock option, stock purchase or similar plan or an SEC Rule 145 transaction); (b) the consummation of a Sale of the Company and distribution of proceeds to or escrow for the benefit of the Stockholders in accordance with the Restated Certificate, provided that the provisions of Section 3 hereof will continue after the closing of any Sale of the Company to the extent necessary to enforce the

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<sup>26</sup> The intent of this covenant is to reduce the burden on issuers in ascertaining the "bad actor" status of its stockholders for Rule 506 offerings. A Compliance and Disclosure Interpretation promulgated by the Securities and Exchange Commission (Question 260.14) states that, "[a]n issuer may reasonably rely on a covered person's agreement to provide notice of a potential or actual bad actor triggering event. . . ." It also notes, however, that if an offering is continuous, delayed or long-lived, the issuer must update its inquiry through bring-down representations, negative consent letters or other reasonable means.

<sup>27</sup> Some voting agreements require a "qualified public offering" for the termination of the agreement. The blocking rights contained in the Certificate of Incorporation, however, should provide sufficient protection to the investors. Retaining a "qualified public offering" requirement in the voting agreement creates possible blocking rights for individual investors not contemplated by the Certificate of Incorporation, and in any event gives rise to the need to obtain additional waivers and consents when one should be sufficient. The termination provision should conform to that in the Right of First Refusal and Co-sale Agreement and the Investors' Rights Agreement (other than the registration rights termination provision).

provisions of Section 3 with respect to such Sale of the Company; (c) termination of this Agreement in accordance with Section 7.8 below[; and (d) \_\_\_\_\_, 20\_\_].

7. Miscellaneous.

7.1 Additional Parties.

(a) Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Preferred Stock after the date hereof, as a condition to the issuance of such shares the Company shall require that any purchaser of such shares become a party to this Agreement by executing and delivering (i) the Adoption Agreement attached to this Agreement as Exhibit A, or (ii) a counterpart signature page hereto agreeing to be bound by and subject to the terms of this Agreement as an Investor and Stockholder hereunder. In either event, each such person shall thereafter be deemed an Investor and Stockholder for all purposes under this Agreement.

(b) [In the event that after the date of this Agreement, the Company enters into an agreement with any Person to issue shares of capital stock to such Person (other than to a purchaser of Preferred Stock described in Section 7.1(a) above), [following which such Person shall hold Shares constituting one percent (1%) or more of the then outstanding capital stock of the Company (treating for this purpose all shares of Common Stock issuable upon exercise of or conversion of outstanding options, warrants or convertible securities, as if exercised and/or converted or exchanged)], then, the Company shall cause such Person, as a condition precedent to entering into such agreement, to become a party to this Agreement by executing an Adoption Agreement in the form attached hereto as Exhibit A, agreeing to be bound by and subject to the terms of this Agreement as a [Key Holder and] Stockholder and thereafter such person shall be deemed a Stockholder for all purposes under this Agreement.]<sup>28</sup>

7.2 Transfers. Each transferee or assignee of any Shares subject to this Agreement shall continue to be subject to the terms hereof, and, as a condition precedent to the Company's recognition of such transfer, each transferee or assignee shall agree in writing to be subject to each of the terms of this Agreement by executing and delivering an Adoption Agreement substantially in the form attached hereto as Exhibit A. Upon the execution and delivery of an Adoption Agreement by any transferee, such transferee shall be deemed to be a party hereto as if such transferee were the transferor and such transferee's signature appeared on the signature pages of this Agreement and shall be deemed to be an Investor and Stockholder, or Key Holder and Stockholder, as applicable. The Company shall not permit the transfer of the Shares subject to this Agreement on its books or issue a new certificate representing any such Shares unless and until such transferee shall have complied with the terms of this Section 7.2. Each certificate instrument, or book entry representing the Shares subject to this Agreement if issued on or after the date of this Agreement shall be notated by the Company with the legend set forth in Section 7.12.

7.3 Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the

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<sup>28</sup> This requirement cannot apply to any shares issued to an employee to which California Department of Corporations rules 260.140.41(l) or 260.140.42(i) apply. Voting rights must be unrestricted.

parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

7.4 Governing Law.<sup>29</sup> This Agreement shall be governed by the internal law of the [State of Delaware],<sup>30</sup> without regard to conflict of law principles that would result in the application of any law other than the law of the [State of Delaware].

7.5 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via electronic mail (including pdf or any electronic signature complying with the U.S. ESIGN Act of 2000, *e.g.*, www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

7.6 Titles and Subtitles. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

7.7 Notices.

(a) General. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt or (a) personal delivery to the party to be notified, (b) when sent, if sent by electronic mail during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient's next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) business day after the business day of deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on Schedule A or Schedule B hereto, or (as to the Company) to the principal office of the Company and to the attention of the Chief Executive Officer, or, in any case, to such e-mail address or address as subsequently modified by written notice given in accordance with this Section 7.7. If notice is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to [Company Counsel Name and Address] and if notice is given to Stockholders, a copy (which copy shall not constitute notice) shall also be given to [Investor Counsel Name and Address].<sup>31</sup>

(b) Consent to Electronic Notice. Each Investor and Key Holder consents to the delivery of any stockholder notice pursuant to the Delaware General Corporation Law (the "DGCL"), as amended or superseded from time to time, by electronic transmission pursuant to Section 232 of the DGCL (or any successor thereto) at the electronic mail address set forth below such Investor's or Key Holder's name on the Schedules hereto, as updated from time

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<sup>29</sup> After choosing the applicable law, the parties should determine whether such law imposes any particular requirements, such as special legends or other notices, in order to make restrictions on transfer of shares effective.

<sup>30</sup> Some practitioners may select Delaware law as it has historically been the richest source for corporation law precedent. Other practitioners will prefer to choose the (non-Delaware) jurisdiction in which they are admitted to practice, if for no other reason than not having to retain Delaware counsel in the event they are called upon to give an enforceability opinion.

<sup>31</sup> Consider moving the counsel cc address to the schedules for investors, since often more than one.

to time by notice to the Company, or as on the books of the Company. To the extent that any notice given by means of electronic transmission is returned or undeliverable for any reason, the foregoing consent shall be deemed to have been revoked until a new or corrected electronic mail address has been provided, and such attempted electronic notice shall be ineffective and deemed to not have been given. Each Investor and Key Holder agrees to promptly notify the Company of any change in its electronic mail address, and that failure to do so shall not affect the foregoing.

7.8 Consent Required to Amend, Modify, Terminate or Waive.<sup>32</sup> This Agreement may be amended, modified or terminated (other than pursuant to Section 6) and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a written instrument executed by (a) the Company; (b) the Key Holders holding [*specify percentage*] of the Shares then held by the Key Holders [provided that such consent shall not be required if the Key Holders do not then own Shares representing at least [\_\_]% of the outstanding capital stock of the Company] [who are then providing services to the Company as officers, employees or consultants]; and (c) the holders of [*specify percentage*] of the shares of Common Stock issued or issuable upon conversion of the shares of Preferred Stock held by the Investors (voting together as a single class). Notwithstanding the foregoing:

(a) this Agreement may not be amended, modified or terminated and the observance of any term of this Agreement may not be waived with respect to any Investor or Key Holder without the written consent of such Investor or Key Holder unless such amendment, modification, termination or waiver applies to all Investors or Key Holders, as the case may be, in the same fashion;

(b) the provisions of Section 1.2(a) and this Section 7.8(b) may not be amended, modified, terminated or waived without the written consent of [*Name of Investor 1*];

(c) the provisions of Section 1.2(b) and this Section 7.8(c) may not be amended, modified, terminated or waived without the written consent of [*Name of Investor 2*];

(d) the provisions of Section 1.2(c) and this Section 7.8(d) may not be amended, modified, terminated or waived without the written consent of [the Key Holders][the Key Holders who are at such time providing services to the Company as an officer, employee or consultant][the holders of [*specify percentage*] of shares of Common Stock];

(e) the consent of the Key Holders shall not be required for any amendment, modification, termination or waiver if such amendment, modification, termination, or waiver either (A) is not directly applicable to the rights of the Key Holders hereunder; or (B) does not adversely affect the rights of the Key Holders in a manner that is different than the effect on the rights of the other parties hereto;

(f) [Schedule A hereto may be amended by the Company from time to time in accordance with the Purchase Agreement to add information regarding additional

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<sup>32</sup> To the extent there are rights of individual parties to designate directors, care should be taken to ensure that the amendment section requires the vote of such party to amend the relevant sections of the document.

Purchasers (as defined in the Purchase Agreement) without the consent of the other parties hereto]; and

(g) any provision hereof may be waived by the waiving party on such party's own behalf, without the consent of any other party.

The Company shall give prompt written notice of any amendment, modification, termination, or waiver hereunder to any party that did not consent in writing thereto. Any amendment, modification, termination, or waiver effected in accordance with this Section 7.8 shall be binding on each party and all of such party's successors and permitted assigns, whether or not any such party, successor or assignee entered into or approved such amendment, modification, termination or waiver. For purposes of this Section 7.8, the requirement of a written instrument may be satisfied in the form of an action by written consent of the Stockholders circulated by the Company and executed by the Stockholder parties specified, whether or not such action by written consent makes explicit reference to the terms of this Agreement.

7.9 Delays or Omissions. No delay or omission to exercise any right, power or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power or remedy of such non-breaching or non-defaulting party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default previously or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any party of any breach or default under this Agreement, or any waiver on the part of any party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

7.10 Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision.

7.11 Entire Agreement. [Upon the effectiveness of this Agreement, the Prior Agreement shall be deemed amended and restated to read in its entirety as set forth in this Agreement.]<sup>33</sup> This Agreement (including the Exhibits hereto), [and] the Restated Certificate [and the other Transaction Agreements (as defined in the Purchase Agreement)] constitute the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties is expressly canceled.

7.12 Share Certificate Legend. Each certificate, instrument, or book entry representing any Shares issued after the date hereof shall be notated by the Company with a legend reading substantially as follows:

“THE SHARES REPRESENTED HEREBY ARE SUBJECT TO A VOTING AGREEMENT, AS MAY BE AMENDED FROM TIME TO TIME (A COPY OF

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<sup>33</sup> The drafter should ensure that the relevant signatories to the current agreement have authority to terminate the prior agreement under the terms of the latter.

WHICH MAY BE OBTAINED UPON WRITTEN REQUEST FROM THE COMPANY), AND BY ACCEPTING ANY INTEREST IN SUCH SHARES THE PERSON ACCEPTING SUCH INTEREST SHALL BE DEEMED TO AGREE TO AND SHALL BECOME BOUND BY ALL THE PROVISIONS OF THAT VOTING AGREEMENT, INCLUDING CERTAIN RESTRICTIONS ON TRANSFER AND OWNERSHIP SET FORTH THEREIN.”

The Company, by its execution of this Agreement, agrees that it will cause the certificates, instruments, or book entry evidencing the Shares issued after the date hereof to be notated with the legend required by this Section 7.12 of this Agreement, and it shall supply, free of charge, a copy of this Agreement to any holder of such Shares upon written request from such holder to the Company at its principal office. The parties to this Agreement do hereby agree that the failure to cause the certificates, instruments, or book entry evidencing the Shares to be notated with the legend required by this Section 7.12 herein and/or the failure of the Company to supply, free of charge, a copy of this Agreement as provided hereunder shall not affect the validity or enforcement of this Agreement.

7.13 Stock Splits, Dividends and Recapitalizations. In the event of any issuance of Shares or the voting securities of the Company hereafter to any of the Stockholders (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like), such Shares shall become subject to this Agreement and shall be notated with the legend set forth in Section 7.12.

7.14 Manner of Voting. The voting of Shares pursuant to this Agreement may be effected in person, by proxy, by written consent or in any other manner permitted by applicable law. For the avoidance of doubt, voting of the Shares pursuant to the Agreement need not make explicit reference to the terms of this Agreement.

7.15 Further Assurances. At any time or from time to time after the date hereof, the parties agree to cooperate with each other, and at the request of any other party, to execute and deliver any further instruments or documents and to take all such further action as the other party may reasonably request in order to carry out the intent of the parties hereunder.

7.16 Dispute Resolution. The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [*state*] and to the jurisdiction of the United States District Court for the District of [*judicial district*] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [*state*] or the United States District Court for the District of [*judicial district*], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

[WAIVER OF JURY TRIAL: EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS

AGREEMENT, THE OTHER TRANSACTION DOCUMENTS, THE SECURITIES OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.]

[*Alternative 1*<sup>34</sup>: Any unresolved controversy or claim arising out of or relating to this Agreement, except as (i) otherwise provided in this Agreement, or (ii) any such controversies or claims arising out of either party's intellectual property rights for which a provisional remedy or equitable relief is sought, shall be submitted to arbitration by one (1) arbitrator mutually agreed upon by the parties, and if no agreement can be reached within thirty (30) days after names of potential arbitrators have been proposed by the American Arbitration Association (the "AAA"), then by one (1) arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by the AAA. The arbitration shall take place in [location], in accordance with the AAA rules then in effect, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof. There shall be limited discovery prior to the arbitration hearing as follows: (a) exchange of witness lists and copies of documentary evidence and documents relating to or arising out of the issues to be arbitrated, (b) depositions of all party witnesses and (c) such other depositions as may be allowed by the arbitrator upon a showing of good cause. Depositions shall be conducted in accordance with the [state] Code of Civil Procedure, the arbitrator shall be required to provide in writing to the parties the basis for the award or order of such arbitrator, and a court reporter shall record all hearings, with such record constituting the official transcript of such proceedings.

[Each party will bear its own costs in respect of any disputes arising under this Agreement.] [The prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.] Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [state] having subject matter jurisdiction.]

[*Alternative 2*.<sup>35</sup>

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<sup>34</sup> Some lawyers prefer to include a binding arbitration provision as the sole means of dispute resolution on the theory that arbitration is confidential and may be less expensive and more efficient. Some investors, however, dislike arbitration because the result cannot be appealed and the arbitrator is not bound to follow case law and precedent.

<sup>35</sup> This arbitration provision is offered as an alternative to the AAA provision for parties that would prefer to resolve disputes under the Delaware Rapid Arbitration Act ("DRAA"). The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the DRAA provides for a truncated "summary" proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate. By statute, this proceeding must be concluded no more than

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a “**Dispute**”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 Del. C § 5801, et seq. (the “**DRAA**”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “**Arbitration**”) in accordance with this Section 7.16, and each party represents and warrants that it is not a “consumer” as such term is defined in 6 Del. C. § 2731. By executing this Agreement, (i) each party waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in Sections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party agrees that it will raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 7.16 and understands that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules (the “**Rules**”), as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.<sup>36</sup> To be effective, any departure from the Rules shall require the consent of the Arbitrator (as defined below) and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.<sup>37</sup>

(d) The Arbitration shall be presided over by one (1) arbitrator (the “**Arbitrator**”) who shall be [*insert name of person*]. In the event that [*named person*] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such

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thirty (30) days after its initial filing is served, and the jurisdiction of the Court is highly limited. Second, the DRAA divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the DRAA vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is “substantive” or “procedural” does not apply to arbitrations under the DRAA, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court. Third, the DRAA vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed, thus avoiding the need for parallel proceedings to compel or enjoin arbitration. Finally, the DRAA provides that, absent an agreement otherwise, all matters must be finally determined within one hundred twenty (120) days of the arbitrator’s acceptance of appointment (which deadline may be extended to one hundred eighty (180) days, but no longer, by unanimous consent of the parties). Furthermore, the DRAA imposes a financial penalty on an arbitrator who does not decide the matter within the allotted timeframe: the forfeiture of the arbitrator’s fees. The DRAA makes challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The DRAA also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

<sup>36</sup> The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this Section (b).

<sup>37</sup> The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware. This simply means that Delaware law governs the arbitration, wherever it occurs.

person's appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the "**Replacement Arbitrator**"). The Replacement Arbitrator shall be [*describe qualifications of the Replacement Arbitrator*]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.<sup>38</sup>

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.<sup>39</sup>

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.<sup>40</sup>

(g) The arbitral award (the "**Award**") shall (i) be rendered within [one hundred twenty (120)] days after the Arbitrator's acceptance of his or her appointment;<sup>41</sup> (ii) be delivered in writing; (iii) state the reasons for the Award;<sup>42</sup> (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;<sup>43</sup> and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section 7.16 shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief;

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<sup>38</sup> The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

<sup>39</sup> The DRAA empowers the parties to include one, both or neither of the provisions set forth in Section (e). If the parties wish to proceed without discovery, neither of the sentences in Section (e) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The DRAA would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The DRAA contemplates that the scope of discovery is customizable in this Agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

<sup>40</sup> The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the Arbitration.

<sup>41</sup> The parties may specify a longer period for the Arbitration. If they do not do so, the one hundred twenty (120) day period of the DRAA is the default, and such period may be extended by no more than an additional sixty (60) days, and then only upon consent of all parties to the Arbitration.

<sup>42</sup> A reasoned award is not required by the DRAA, but may be required by the parties' contract.

<sup>43</sup> The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Section (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator's award, in which case clause (iv) of Section (g) should not be included.

provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.<sup>44</sup>

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,<sup>45</sup> and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, [any third-party discovery proceedings, including any discovery obtained pursuant thereto,]<sup>46</sup> and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.<sup>47</sup> In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half (1/2) of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.<sup>48</sup>

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “**Respondent**”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines

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<sup>44</sup> Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

<sup>45</sup> This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

<sup>46</sup> Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in Section (e) above.

<sup>47</sup> Clause (v) would be excluded in the event that third-party discovery was not provided for in Section (e) above.

<sup>48</sup> The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

of res judicata, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section 7.16, if any amendment to the DRAA is enacted after the date of this Agreement, and such amendment would render any provision of this Section 7.16 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 7.16 shall be enforced to the fullest extent permitted by law.

(l) [Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.<sup>49</sup>] [*Alternative A:*<sup>50</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>51</sup> The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.<sup>52</sup>] [*Alternative B:*<sup>53</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>54</sup> The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.]]

7.17 Costs of Enforcement. If any party to this Agreement seeks to enforce its rights under this Agreement by legal proceedings, the non-prevailing party shall pay all costs and expenses incurred by the prevailing party, including, without limitation, all reasonable attorneys' fees.]

7.18 Aggregation of Stock. All Shares held or acquired by a Stockholder and/or its Affiliates shall be aggregated together for the purpose of determining the availability of any rights under this Agreement, and such Affiliated persons may apportion such rights as among themselves in any manner they deem appropriate.

[Signature Page Follows]

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<sup>49</sup> The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of Section (g).

<sup>50</sup> The following is an alternative appellate provision in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the Federal Arbitration Act (the "FAA").

<sup>51</sup> In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one (1) or more senior Delaware lawyers.

<sup>52</sup> This provision contemplates a scope of challenge to the Arbitrator's final judgment limited to the grounds for review of an arbitral award under the FAA. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

<sup>53</sup> The following is an alternative appellate provision for use in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.

<sup>54</sup> See footnote 50 above.

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Voting Agreement as of the date first written above.

COMPANY: *[Insert Company Name]*

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

KEY HOLDERS: *[Insert Key Holder Name]*

Signature: \_\_\_\_\_

INVESTORS: *[Insert Investor Name]*

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SCHEDULE A**

**INVESTORS**

**Name and Address**

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

**SCHEDULE B**

**KEY HOLDERS**

**Name and Address**

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

**EXHIBIT A**

**ADOPTION AGREEMENT**

This Adoption Agreement (“**Adoption Agreement**”) is executed on \_\_\_\_\_, 20\_\_, by the undersigned (the “**Holder**”) pursuant to the terms of that certain Voting Agreement dated as of [\_\_\_\_\_, 20\_\_] (the “**Agreement**”), by and among the Company and certain of its Stockholders, as such Agreement may be amended or amended and restated hereafter. Capitalized terms used but not defined in this Adoption Agreement shall have the respective meanings ascribed to such terms in the Agreement. By the execution of this Adoption Agreement, the Holder agrees as follows:

1.1 Acknowledgement. Holder acknowledges that Holder is acquiring certain shares of the capital stock of the Company (the “**Stock**”)[ or options, warrants, or other rights to purchase such Stock (the “**Options**”)], for one of the following reasons (Check the correct box):

As a transferee of Shares from a party in such party’s capacity as an “Investor” bound by the Agreement, and after such transfer, Holder shall be considered an “Investor” and a “Stockholder” for all purposes of the Agreement.

As a transferee of Shares from a party in such party’s capacity as a “Key Holder” bound by the Agreement, and after such transfer, Holder shall be considered a “Key Holder” and a “Stockholder” for all purposes of the Agreement.

As a new “Investor” in accordance with Section 7.1(a) of the Agreement, in which case Holder will be an “Investor” and a “Stockholder” for all purposes of the Agreement.

In accordance with Section 7.1(b) of the Agreement, as a new party who is not a new “Investor,” in which case Holder will be a “Stockholder” for all purposes of the Agreement.

1.2 Agreement. Holder hereby (a) agrees that the Stock [Options], and any other shares of capital stock or securities required by the Agreement to be bound thereby, shall be bound by and subject to the terms of the Agreement and (b) adopts the Agreement with the same force and effect as if Holder were originally a party thereto.

1.3 Notice. Any notice required or permitted by the Agreement shall be given to Holder at the address or facsimile number listed below Holder’s signature hereto.

**HOLDER:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
E-mail Address: \_\_\_\_\_

ACCEPTED AND AGREED:

**[COMPANY]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## ADDENDUM TO VOTING AGREEMENT: SAMPLE SALE RIGHTS<sup>55</sup>

### Section \_\_. Sale Rights.

\_\_. Initiation of Sale Process. Upon written notice to the Company from the Electing Holders, the Company shall initiate a process (the “**Sale Process**”), in accordance with this Section \_\_, intended to result in a Sale of the Company. Such written notice shall include a designation of one (1) individual (the “**Holder Representative**”) to act on behalf of the Electing Holders and to exercise the authority granted to the Holder Representative pursuant to Section \_\_ below. Each of the Stockholders and the Company agree to use his, her or its commercially reasonable efforts, in consultation with the Financial Advisor (as defined below) and Deal Counsel (as defined below), to facilitate a Sale of the Company. In furtherance of the foregoing, upon receipt of the notice described above the Company shall, and shall cause its officers, employees, consultants, counsel and advisors to take the actions set forth in Section \_\_ below.

#### \_\_.1. Specific Obligations.

\_\_.1.1 Advisors. The Company shall engage an investment bank (the “**Financial Advisor**”) and a law firm (the “**Deal Counsel**”) reasonably satisfactory to the Holder

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<sup>55</sup> The “Sale Rights” provisions in this Addendum are not typically included in venture capital financings; they are more common in later-stage private equity deals. They have been drafted in response to the Delaware Chancery Court’s ruling in *In re Trados Inc. S’holder Litigation*, Case No. C.A. 1512-CC (Del. Ch. Ct. Jul. 24, 2009). In that case, where a Company was sold for less than the preferred stock liquidation preferences (leaving nothing for the common stockholders upon the sale), the Court concluded that, in circumstances where the interests of the common stockholders may diverge from those of the preferred, a director can breach his or her duty by approving a sale which could be viewed as improperly favoring the interests of the preferred over those of the common stockholders. The plaintiffs in that case argued that the Company was on an upswing, and that if the Company had been sold at a later date, there may have been proceeds for common stockholders. This ruling may expose directors to potential liability where they vote in favor of a sale at a price below the liquidation preferences that results in no proceeds for common stockholders. Accordingly, the “Sale Rights” provisions are designed to insulate the Board from a *Trados*-type claim. In particular, since this section provides for redemption rights additional to any that may be included in the Certificate of Incorporation, selling the Company may be the only means by which the Board is able to honor this contractual “put” obligation.

Investors who are bridging a Company to a sale may want to consider amending the Voting Agreement to include provisions such as those found in this Addendum, particularly where (1) there are no disinterested directors to vote on the sale transaction, and (2) the transaction is anticipated to result in proceeds below the liquidation preferences.

The Company will need to consult with its accountants with respect to the accounting treatment of the “put right” provided for here; it is the drafters’ hope that it is attenuated enough that the Company’s accountants will not require it to be reflected as debt on the Company’s balance sheet.

Note that this provision is intended to work in conjunction with the drag-along provisions, and is not in lieu of them. It is the “Electing Holders” who trigger the provisions of this “Sale Rights” section – the same group that triggers the drag-along provisions in Section 3. These “Sale Rights” are not intended to give the Electing Holders (however defined) additional substantive rights, but rather to assist them in effecting the transaction they have approved.

Finally, note that this provision is also intended to address the Delaware Chancery Court’s rulings in *TCV VI, L.P. v. Trading Screen, Inc.*, Case No. C.A. 10164-VCN (Del Ch. Ct. Feb. 26, 2015, redacted Mar. 27, 2015) and *SV Investment Partners, LLC v. Thoughtworks, Inc.*, Case No. C.A. 2724 (Del. Ch. Ct. Nov. 10, 2010), which placed significant limits on a preferred stockholder’s right to have a redemption obligation enforced. In *Trading Screen*, the Court suggested that a board’s decision regarding how much of a corporation’s capital can be applied to the redemption of stock from time to time is protected by the business judgment rule, even where the corporation has sufficient legal surplus to effect the redemption.

Representative (which may be the Company's existing investment bank and law firm) to assist with the Sale Process. The Financial Advisor and Deal Counsel, as well as any other advisors engaged pursuant to this Section (i), shall represent the Company, and only the Company, in the sale process, and the costs, fees and expenses of such advisors shall be paid by the Company pursuant to the terms of engagement letters that are approved by the Holder Representative (such approval not to be unreasonably withheld, conditioned or delayed). None of the Financial Advisor, Deal Counsel or any other advisor selected in accordance with this Section (i) shall be terminated by the Company without the written consent of the Holder Representative.

.1.2 Cooperation With Sale Process. Without limiting the generality of the provisions of Section .1, at the request of the Holder Representative, the Company shall, and shall cause its employees, officers, consultants, counsel and advisors to:

- (i) assist the Financial Advisor in creating a list of potential acquirers;
- (ii) set up and maintain a virtual or actual data room (as elected by the Holder Representative) containing due diligence materials customarily provided in connection with transactions of the nature of a Sale of the Company, along with any other due diligence materials requested by the Holder Representative or reasonably requested by any potential acquirer;
- (iii) execute customary non-disclosure agreements with potential acquirers;
- (iv) provide incentive compensation to members of the Company's management, and in an amount and form, all as determined by the Holder Representative to be necessary or helpful to the successful consummation of the Sale of the Company;
- (v) prepare, or assist the Financial Advisor with the preparation of, any marketing, financial or other materials deemed by the Holder Representative or the Financial Advisor to be necessary or helpful in connection with a Sale of the Company;
- (vi) attend and participate in any meetings, conference calls, or presentations regarding the Company and its business with potential acquirers;
- (vii) execute a letter of intent or term sheet on terms reasonably acceptable to the Holder Representative with one (1) or more potential acquirers;
- (viii) subject to Section .3, execute and perform the Company's obligations contained in such definitive agreements relating to a Sale of the Company as are negotiated by the Holder Representative and the potential acquirer; and
- (ix) communicate regularly and promptly with each of the Financial Advisor and Deal Counsel regarding the Sale Process.

\_\_\_1.3 Approval of the Terms and Conditions of a Proposed Sale of the Company; Failure to Approve a Sale of the Company.

(a) The Company shall cause its management, together with the Financial Advisor and Deal Counsel, to deliver regular updates to its Board regarding material developments in the Sale Process and summarizing the status of the negotiation of the terms and conditions of the Sale of the Company. The Company shall, upon request of the Holder Representative, either call a meeting of its Board or seek the written consent of the Board approving the Sale of the Company and the entering into of the definitive agreements relating thereto.

(b) In the event that the Board approval described in (a) above has not been obtained within the time period requested by the Holder Representative (such time period not to be less than three (3) business days), the Electing Holders shall have the right by written notice (the “**Redemption Notice**”) to require the Company to redeem all of the then outstanding shares of capital stock held by the Electing Holders at a price equal to the amount of proceeds that would have been paid in respect of their shares of capital stock were the Sale of the Company consummated or, in the case of a Sale of the Company that is structured as a sale of all or substantially all of the Company’s assets, the amount of proceeds that would have been paid in respect of their investment in the Company had all proceeds from the proposed Sale of the Company been distributed in a Deemed Liquidation Event (a “**Preferred Redemption**”). The Company and each Investor shall be obligated to effect the Preferred Redemption within ten (10) days of the delivery of the Redemption Notice.

\_\_\_1.4 Appointment and Authority of Holder Representative.

(a) The Stockholders have agreed that it is desirable to designate a representative to act on behalf of the Stockholders for the purposes described in this Section \_\_\_. The Holder Representative shall be selected by the Electing Holders and shall serve as the agent and representative of each Stockholder with respect to the matters set forth in this Agreement.

(b) The Holder Representative shall have full power and authority to take all actions under this Agreement that are to be taken by the Holder Representative. The Holder Representative shall take any and all actions which it believes are necessary or appropriate under this Agreement, including giving and receiving any notice or instruction permitted or required under this Agreement by the Holder Representative, interpreting all of the terms and provisions of this Agreement, consenting to any actions on behalf of the Stockholders in connection with a Sale of the Company (except with respect to any approvals of the final terms and conditions of such Sale of the Company by the Investors in their capacities as such), conducting negotiations with any potential acquirer and its agents regarding such Sale of the Company, dealing with the Company under this Agreement, taking any and all other actions specified in or contemplated by this Agreement, and engaging counsel, accountants or other representatives to represent the Electing Holders in connection with the foregoing matters. Without limiting the generality of the foregoing, the Holder Representative shall have the full power and authority to interpret all the terms and provisions of this Agreement and amendment(s) hereof or thereof in its capacity as Holder Representative.

(c) The Holder Representative shall be indemnified for and shall be held harmless by the Investors against any losses incurred by the Holder Representative or any of its Affiliates and any of their respective partners, directors, officers, employees, agents, stockholders, consultants, attorneys, accountants, advisors, brokers, representatives or controlling persons, in each case relating to the Holder Representative's conduct as Holder Representative, other than damages or losses resulting from the Holder Representative's gross negligence or willful misconduct in connection with its performance under this Agreement. This indemnification shall survive the termination of this Agreement. The Holder Representative may, in all questions arising under this Agreement, rely on the advice of counsel, and for anything done, omitted or suffered in good faith by the Holder Representative in accordance with such advice, the Holder Representative shall not be liable to the Stockholders. In no event shall the Holder Representative be liable hereunder or in connection herewith to the Stockholders for any indirect, punitive, special or consequential damages.

(d) Any action taken by the Holder Representative pursuant to the authority granted in this Section shall be effective and absolutely binding as the action of the Stockholders under this Agreement.

(e) The Company shall be entitled to rely on the actions and determinations of the Holder Representative, and shall have no liability whatsoever with respect to any action or omission of them taken in reliance on the actions or omissions of the Holder Representative.

This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.

### *Preliminary Note*

*This term sheet maps to the NVCA Model Documents, and for convenience the provisions are grouped according to the particular Model Document in which they may be found. Although this term sheet is somewhat longer than a “typical” VC Term Sheet, the aim is to provide a level of detail that makes the term sheet useful as both a road map for the document drafters and as a reference source for the business people to quickly find deal terms without the necessity of having to consult the legal documents (assuming of course there have been no changes to the material deal terms prior to execution of the final documents). For Series B and later transactions, consider substantially shortening to refer to deal terms being “consistent with prior rounds, subject to reasonable review by Lead Investor” (as noted in the prior sentence, deal terms often are negotiated further between term sheet and closing, so relying on a term sheet for one round in a later round may prove inaccurate).*

**TERM SHEET  
FOR SERIES A PREFERRED STOCK FINANCING OF  
[INSERT COMPANY NAME], INC.  
[\_\_\_\_\_, 20\_\_]**

This Term Sheet summarizes the principal terms of the Series A Preferred Stock Financing of [\_\_\_\_\_] , Inc., a [Delaware] corporation (the “**Company**”). In consideration of the time and expense devoted and to be devoted by the Investors with respect to this investment, the No Shop/Confidentiality provisions of this Term Sheet shall be binding obligations of the Company whether or not the financing is consummated. No other legally binding obligations will be created until definitive agreements are executed and delivered by all parties. This Term Sheet is not a commitment to invest, and is conditioned on the completion of the conditions to closing set forth below. This Term Sheet shall be governed in all respects by the laws of [\_\_\_\_\_].<sup>1</sup>

### **Offering Terms**

*Security:* Series A Preferred Stock (the “**Series A Preferred**”).

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<sup>1</sup> Because a “nonbinding” term sheet governed by the law of a jurisdiction such as Delaware, New York or the District of Columbia may in fact create an enforceable obligation to negotiate in good faith to come to agreement on the terms set forth in the term sheet, parties should give consideration to the choice of law selected to govern the term sheet. Compare *SIGA Techs., Inc. v. PharmAthene, Inc.*, Case No. C.A. 2627 (Del. Supreme Court May 24, 2013) (holding that where parties agreed to negotiate in good faith in accordance with a term sheet, that obligation was enforceable notwithstanding the fact that the term sheet itself was not signed and contained a footer on each page stating “Non Binding Terms”); *EQT Infrastructure Ltd. v. Smith*, 861 F. Supp. 2d 220 (S.D.N.Y. 2012); *Stanford Hotels Corp. v. Potomac Creek Assocs., L.P.*, 18 A.3d 725 (D.C. App. 2011) with *Rosenfield v. United States Trust Co.*, 5 N.E. 323, 326 (Mass. 1935) (“An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto.”); *Martin v. Martin*, 326 S.W.3d 741 (Tex. App. 2010); *Va. Power Energy Mktg. v. EQT Energy, LLC*, 2012 WL 2905110 (E.D. Va. July 16, 2012).

*Closing Date:* As soon as practicable following the Company’s acceptance of this Term Sheet and satisfaction of the conditions to closing (the “**Closing**”). [provide for multiple closings if applicable]

*Conditions to Closing:* Standard conditions to Closing, including, among other things, satisfactory completion of financial and legal due diligence, qualification of the shares under applicable Blue Sky laws, the filing of a Certificate of Incorporation establishing the rights and preferences of the Series A Preferred, [obtaining CFIUS clearance and/or a statement from CFIUS that no further review is necessary,]<sup>2</sup> [and an opinion of counsel to the Company].<sup>3</sup>

*Investors:* Investor No. 1: [\_\_\_\_\_] shares ([\_]%), \$[\_\_\_\_\_]   
 Investor No. 2: [\_\_\_\_\_] shares ([\_]%), \$[\_\_\_\_\_]   
 [as well other investors mutually agreed upon by Investors and the Company]

*Amount Raised:*<sup>4</sup> \$[\_\_\_\_\_] , [including \$[\_\_\_\_\_] from the conversion of SAFEs/principal [and interest] on bridge notes].<sup>5</sup>

*Pre-Money Valuation:* The price per share of the Series A Preferred (the “**Original Purchase Price**”) shall be the price determined on the basis of a fully-diluted pre-money valuation of \$[\_\_\_\_\_] (which pre-money valuation shall include an [unallocated and uncommitted] employee option pool representing [%] of the fully-diluted post-money capitalization) and a fully-diluted post-money valuation of \$[\_\_\_\_\_].

## **CHARTER**

*Dividends:* [Alternative 1: Dividends will be paid on the Series A Preferred on an as-converted basis when, as, and if paid on the Common Stock.]

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<sup>2</sup> To be included if the parties review the facts of the investment and determine that a CFIUS filing is warranted. Where a mandatory filing is necessary, that filing must be submitted 45 days in advance of closing, but obtaining CFIUS clearance in advance of closing is not a requirement of law. However, submitting a CFIUS filing and then closing before the review process is completed creates regulatory risks for all parties that are best avoided if the timing of the investment permits.

<sup>3</sup> See NVCA Model Legal Opinion for detailed commentary on legal opinions.

<sup>4</sup> This provision would have to be modified for staged investments or investments dependent on the achievement of milestones by the Company.

<sup>5</sup> Convertible instruments that convert at a discount may provide for a “shadow” or “subseries” of Preferred that is identical to the new round security except with respect to the amount received on liquidation, so that in a downside exit scenario all investors are at best only getting their money back. Be clear in the term sheet whether the shares issued on conversion are part of the pre-money capitalization or post-money capitalization.

[*Alternative 2:* Non-cumulative dividends will be paid on the Series A Preferred in an amount equal to \$[\_\_\_\_\_] per share of Series A Preferred when and if declared by the Board of Directors.]

[*Alternative 3:* The Series A Preferred will carry an annual [\_\_]% cumulative dividend [payable upon a liquidation or redemption]. For any other dividends or distributions, participation with Common Stock on an as-converted basis.]<sup>6</sup>

*Liquidation Preference:*

In the event of any liquidation, dissolution or winding up of the Company, the proceeds shall be paid as follows:

[*Alternative 1 (non-participating Preferred Stock):* First pay [\_\_ times] the Original Purchase Price [plus [accrued and] declared and unpaid dividends] on each share of Series A Preferred (or, if greater, the amount that the Series A Preferred would receive on an as-converted basis). The balance of any proceeds shall be distributed pro rata to holders of Common Stock.]

[*Alternative 2 (full participating Preferred Stock):* First pay [\_\_\_\_ times] the Original Purchase Price [plus accrued and declared and unpaid dividends] on each share of Series A Preferred. Thereafter, the Series A Preferred participates with the Common Stock pro rata on an as-converted basis.]

[*Alternative 3 (cap on Preferred Stock participation rights):* First pay [\_\_\_\_ times] the Original Purchase Price [plus accrued and declared and unpaid dividends] on each share of Series A Preferred. Thereafter, Series A Preferred participates with Common Stock pro rata on an as-converted basis until the holders of Series A Preferred receive an aggregate of [\_\_\_\_\_] times the Original Purchase Price (including the amount paid pursuant to the preceding sentence).]

A merger or consolidation (other than one in which stockholders of the Company own a majority by voting power of the outstanding shares of the surviving or acquiring corporation) or a sale, lease, transfer, exclusive license or other disposition of all or substantially all of the assets of the Company will be treated as a liquidation event (a “**Deemed Liquidation Event**”), thereby triggering payment of the liquidation preferences described

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<sup>6</sup> In some cases, accrued and unpaid dividends are payable on conversion as well as upon a liquidation event. Most typically, however, dividends are not paid if the preferred is converted. Another alternative is to give the Company the option to pay accrued and unpaid dividends in cash or in common shares valued at fair market value. The latter are referred to as “PIK” (payment-in-kind) dividends, which are quite rare in this context.

above unless the holders of [\_\_\_\_]%<sup>7</sup> of the Series A Preferred elect otherwise (the “**Requisite Holders**”). [The Investors’ entitlement to their liquidation preference shall not be abrogated or diminished in the event part of the consideration is subject to escrow or indemnity holdback in connection with a Deemed Liquidation Event.]<sup>8</sup>

*Voting Rights:*

The Series A Preferred shall vote together with the Common Stock on an as-converted basis, and not as a separate class, except (i) so long as [*insert fixed number or %*] of the shares of Series A Preferred issued in the transaction are outstanding, the Series A Preferred as a separate class shall be entitled to elect [\_\_\_\_\_] [( )] members of the Board of Directors ([each a] “Preferred Director”), (ii) as required by law, and (iii) as provided in “Protective Provisions” below. The Company’s Charter will provide that the number of authorized shares of Common Stock may be increased or decreased with the approval of a majority of the Preferred and Common Stock, voting together as a single class, and without a separate class vote by the Common Stock.<sup>9</sup>

*Protective Provisions:*

So long as [*insert fixed number or %*] shares of Series A Preferred issued in the transaction are outstanding, in addition to any other vote or approval required under the Company’s Charter or Bylaws, the Company will not, without the written consent of the Requisite Holders, either directly or by amendment, merger, consolidation, recapitalization, reclassification, or otherwise:

- (i) liquidate, dissolve or wind-up the affairs of the Company or effect any Deemed Liquidation Event; (ii) amend, alter, or repeal any provision of the Charter or Bylaws [in a manner adverse to the Series A Preferred Stock]; (iii) create or authorize the creation of or issue any other security convertible into or exercisable for any equity security unless the same ranks junior to the Series A Preferred with respect to its rights, preferences and privileges, or increase the authorized number of shares of Series A Preferred; (iv) sell, issue, sponsor, create or distribute any digital tokens, cryptocurrency or other blockchain-based assets without approval of the Board of Directors[, including the Investor

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<sup>7</sup> Careful thought should be given to the voting threshold based on the makeup of the round, especially if multiple series/classes are implicated. Also bear in mind that anti-dilution adjustments may result in changes in voting power.

<sup>8</sup> See [Section 2.3.4](#) of the Model Certificate of Incorporation for an explanation of this provision.

<sup>9</sup> For corporations incorporated in California, one cannot “opt out” of the statutory requirement of a separate class vote by Common Stockholders to authorize shares of Common Stock. The purpose of this provision is to “opt out” of DGCL 242(b)(2). If (contrary to the protective provisions in this Term Sheet) the Preferred Stock is *not* intended to be able to block future financings, include a 242(b)(2) waiver for the Preferred Stock as well.

Directors]; (v) purchase or redeem or pay any dividend on any capital stock prior to the Series A Preferred, other than stock repurchased at cost from former employees and consultants in connection with the cessation of their service, [or as otherwise approved by the Board of Directors[, including the approval of [at least one] Preferred Director]; or (vi) [adopt, amend, terminate or repeal any equity (or equity-linked) compensation plan or amend or waive any of the terms of any option or other grant pursuant to any such plan; (vii)]<sup>10</sup> create or authorize the creation of any debt security[, if the aggregate indebtedness of the Corporation and its subsidiaries for borrowed money following such action would exceed \$[\_\_\_\_\_] [other than equipment leases, bank lines of credit or trade payables incurred in the ordinary course] [unless such debt security has received the prior approval of the Board of Directors, including the approval of [at least one] Preferred Director; [or](viii) create or hold capital stock in any subsidiary that is not wholly-owned, or dispose of any subsidiary stock or all or substantially all of any subsidiary assets; [or (ix) increase or decrease the authorized number of directors constituting the Board of Directors or change the number of votes entitled to be cast by any director or directors on any matter].

*Optional Conversion:*

The Series A Preferred initially converts 1:1 to Common Stock at any time at option of holder, subject to adjustments for stock dividends, splits, combinations and similar events and as described below under “Anti-dilution Provisions.”

*Anti-dilution Provisions:*

In the event that the Company issues additional securities at a purchase price less than the current Series A Preferred conversion price, such conversion price shall be adjusted in accordance with the following formula:

$$CP_2 = CP_1 * (A+B) / (A+C)$$

Where:

CP<sub>2</sub> = Series A Conversion Price in effect immediately after new issue

CP<sub>1</sub> = Series A Conversion Price in effect immediately prior to new issue

A = Number of shares of Common Stock deemed to be outstanding immediately prior to new issue (includes all shares of outstanding common stock, all shares of outstanding preferred stock

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<sup>10</sup> See footnote in model charter.

on an as-converted basis, and all outstanding options on an as-exercised basis; and does not include any convertible securities converting into this round of financing)<sup>11</sup>

- B = Aggregate consideration received by the Company with respect to the new issue divided by CP<sub>1</sub>
- C = Number of shares of stock issued in the subject transaction

The foregoing shall be subject to customary exceptions, including, without limitation, the following:

(i) securities issuable upon conversion of any of the Series A Preferred, or as a dividend or distribution on the Series A Preferred; (ii) securities issued upon the conversion of any debenture, warrant, option, or other convertible security; (iii) Common Stock issuable upon a stock split, stock dividend, or any subdivision of shares of Common Stock; (iv) shares of Common Stock (or options to purchase such shares of Common Stock) issued or issuable to employees or directors of, or consultants to, the Company pursuant to any plan approved by the Company's Board of Directors [including at least [one] Preferred Director(s)], and other customary exceptions<sup>12</sup>.

*Mandatory Conversion:*

Each share of Series A Preferred will automatically be converted into Common Stock at the then applicable conversion rate in the event of the closing of a firm commitment underwritten public offering [with a price of [\_\_\_] times the Original Purchase Price]<sup>13</sup> (subject to adjustments for stock dividends, splits, combinations and similar events) and [gross] proceeds to the Company of not less than \$[\_\_\_\_\_] (a "QPO"), or (ii) upon the written consent of the Requisite Holders.

*[Pay-to-Play:*

Unless the Requisite Holders elect otherwise, on any subsequent [down] round all holders of Series A Preferred Stock are required to purchase their pro rata share of the securities set aside by the Board of Directors for purchase by such holders. [A

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<sup>11</sup> The most broad based formula would include shares reserved in the option pool; a narrower base would exclude options or other convertibles. The formula above is the most typical.

<sup>12</sup> See Sections 4.4.1(a)(v)-(viii) of the Model Certificate of Incorporation for additional exclusions; consider building into the term sheet to avoid later "negotiation".

<sup>13</sup> The per share price floor generally benefits small/minority holders. Consider 1) allowing a non-QPO to become a QPO if an adjustment is made to the Conversion Price for the benefit of the Investor, so that such Investor does not have the power to block an IPO and 2) whether IPO proceeds alone should be sufficient to establish the minimum requirements for an IPO that triggers conversion.

proportionate amount/all] of the shares of Series A Preferred of any holder failing to do so will automatically convert to Common Stock and lose corresponding preferred stock rights, such as the right to a Board seat if applicable.

*[Redemption Rights:]*<sup>14</sup>

Unless prohibited by applicable law governing distributions to stockholders, the Series A Preferred shall be redeemable at the option of the Requisite Holders commencing any time after the five (5) year anniversary of the Closing at a price equal to the Original Purchase Price [plus all accrued/declared but unpaid dividends]. Redemption shall occur in three equal annual portions. Upon a redemption request from the holders of the required percentage of the Series A Preferred, all Series A Preferred shares shall be redeemed [(except for any Series A holders who affirmatively opt-out)].

### **STOCK PURCHASE AGREEMENT**

*Representations and Warranties:*

Standard representations and warranties by the Company customary for its size and industry. [Representations and warranties regarding CFIUS.]<sup>15</sup>

*[Regulatory Covenants (CFIUS):*

*To the extent a CFIUS filing is or may be required:* Investors and the Company shall use reasonable best efforts to submit the proposed transaction to the Committee on Foreign Investment in the United States (“CFIUS”) and obtain CFIUS clearance or a statement from CFIUS that no further review is necessary with respect to the parties’ [notice/declaration]].<sup>16</sup>

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<sup>14</sup> Redemption provisions are rare and even more rarely exercised. If included, note that due to statutory restrictions, the Company may not be legally permitted to redeem in the very circumstances where investors most want it (the so-called “sideways situation”). Accordingly, and particularly in light of the Delaware Chancery Court’s ruling in *Thoughtworks* (see discussion in Model Certificate of Incorporation), investors may seek enforcement provisions to give their redemption rights more teeth - e.g., the holders of a majority of the Series A Preferred shall be entitled to elect a majority of the Company’s Board of Directors, or shall have consent rights on Company cash expenditures, until such amounts are paid in full. Also, while it is possible that the right to receive dividends on redemption could give rise to a DGCL Section 305 “deemed dividend” problem, many tax practitioners take the view that if the liquidation preference provisions in the Charter are drafted to provide that, on conversion, the holder receives the greater of its liquidation preference or its as-converted amount (as provided in the Model Certificate of Incorporation), then there is no Section 305 issue.

<sup>15</sup> To be considered in order to address issues under the Defense Production Act of 1950 and related regulations (DPA). Relevant representations may include whether or not a company works with “critical technologies” within the meaning of the DPA, whether a company has operations or activities in particular sectors of the U.S. economy or in the U.S. at all, whether a Company stores or maintains certain types of data, whether an Investor is foreign, and whether an Investor has foreign government relationships, among others.

<sup>16</sup> To be included if Investors review the facts of the investment and determine that a CFIUS filing is warranted. When the Investors are foreign persons, a CFIUS filing may be mandatory with respect to certain investments (e.g., some transactions involving “critical technologies”), and voluntary but advisable with respect to others. This covenant may be paired with an explicit reference to the exercise of the redemption right in the Charter in the event of a CFIUS-

*Counsel and Expenses:* [Company] counsel to draft applicable documents. Company to pay all legal and administrative costs of the financing [at Closing], including (subject to the Closing) reasonable fees (not to exceed \$[\_\_\_\_]) and expenses of Investor counsel.

## INVESTORS' RIGHTS AGREEMENT

### *Registration Rights:*

*Registrable Securities:* All shares of Common Stock issuable upon conversion of the Series A Preferred and any other Common Stock held by the Investors will be deemed “**Registrable Securities**.”<sup>17</sup>

*Demand Registration:* Upon earliest of (i) [three (3)-five (5)] years after the Closing; or (ii) [six (6)] months following an initial public offering (“**IPO**”), persons holding [\_\_]%<sup>18</sup> of the Registrable Securities may request [one][two] (consummated) registrations by the Company of their shares. The aggregate offering price for such registration may not be less than \$[5-15] million. A registration will count for this purpose only if (i) all Registrable Securities requested to be registered are registered, and (ii) it is closed, or withdrawn at the request of the Investors (other than as a result of a material adverse change to the Company).

*Registration on Form S-3:* The holders of [[10-30]% of the]<sup>19</sup> Registrable Securities will have the right to require the Company to register on Form S-3, if available for use by the Company, Registrable Securities for an aggregate offering price of at least \$[3-5 million]. There will be no limit on the aggregate number of such Form S-3 registrations,

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mandated divestiture of shares. A CFIUS “notice” is a full-form filing that results in a definitive opinion by CFIUS regarding the national security risks associated with the transaction, but may take months to obtain; a CFIUS “declaration” is a short-form filing that may not result in a definitive opinion by CFIUS but is intended to be able to be obtained within 45 days. If a CFIUS filing is warranted, the parties may also elect to negotiate a basic statement laying out the scope of Investors’ obligation to accept CFIUS conditions (*e.g.*, will Investors be obligated to accept conditions or restriction as a condition of CFIUS clearance that would have a material adverse impact on the Investors?). Whether or not a CFIUS filing is made, the parties may wish to consider other risk allocation measures or terms; examples include unilateral or bilateral waivers of responsibility for CFIUS-related costs and penalties, indemnification terms, or other similar language.

<sup>17</sup> Although not typical, founders/management may sometimes be granted limited registration rights.

<sup>18</sup> The Company will want the percentage to be high enough so that a significant portion of the investor base is behind the demand. Companies will typically resist allowing a single investor to cause a registration. Experienced investors will want to ensure that less experienced investors do not have the right to cause a demand registration. In some cases, different series of Preferred Stock may request the right for that series to initiate a certain number of demand registrations. Companies will typically resist this due to the cost and diversion of management resources when multiple constituencies have this right.

<sup>19</sup> A percent threshold may not be necessary in light of the dollar threshold.

provided that there are no more than [two (2)] per twelve (12) month period.

*Piggyback Registration:* The holders of Registrable Securities will be entitled to “piggyback” registration rights on all registration statements of the Company, subject to the right, however, of the Company and its underwriters to reduce the number of shares proposed to be registered to a minimum of [20-30]% on a pro rata basis and to complete reduction on an IPO at the underwriter’s discretion. In all events, the shares to be registered by holders of Registrable Securities will be reduced only after all other stockholders’ shares are reduced.

*Expenses:* The registration expenses (exclusive of stock transfer taxes, underwriting discounts and commissions will be borne by the Company. The Company will also pay the reasonable fees and expenses, not to exceed \$[\_\_\_\_\_] per registration, of one special counsel to represent all the participating stockholders.

*Lock-up:* Investors shall agree in connection with the IPO, if requested by the managing underwriter, not to sell or transfer any shares of Common Stock of the Company held immediately before the effective date of the IPO for a period of up to 180 days following the IPO (provided all directors and officers of the Company [and [1 – 5]% stockholders] agree to the same lock-up). [Such lock-up agreement shall provide that any discretionary waiver or termination of the restrictions of such agreements by the Company or representatives of the underwriters shall apply to Investors, pro rata, based on the number of shares held.]

*Termination:* [Upon a Deemed Liquidation Event [in which similar rights are granted or the consideration payable to Investors consists of cash or securities of a class listed on a national exchange]] [and/or after the IPO, when the Investor and its Rule 144 affiliates holds less than 1% of the Company’s stock and all shares of an Investor are eligible to be sold without restriction under Rule 144 and/or] [T][t]he [third-fifth] anniversary of the IPO.

No future registration rights may be granted without consent of the holders of [a majority] of the Registrable Securities unless subordinate to the Investor’s rights.

*Management and Information Rights:*

A Management Rights letter from the Company, in a form reasonably acceptable to the Investors, will be delivered prior to Closing to each Investor that requires one.<sup>20</sup>

Any [Major] Investor (who is not a competitor) will be granted access to Company facilities and personnel during normal business hours and with reasonable advance notification. The Company will deliver to such [Major] Investor (i) annual, quarterly, [and monthly] financial statements, and other information as determined by the Board of Directors; [and] (ii) thirty days prior to the end of each fiscal year, a comprehensive operating budget forecasting the Company's revenues, expenses, and cash position on a month-to-month basis for the upcoming fiscal year; and (iii) promptly following the end of each quarter an up-to-date capitalization table. [A "Major Investor" means any Investor who purchases at least \$[\_\_\_\_\_] of Series A Preferred.]

*Right to Participate Pro Rata in Future Rounds:*

All [Major] Investors shall have a pro rata right, based on their percentage equity ownership in the Company (assuming the conversion of all outstanding Preferred Stock into Common Stock and the exercise of all options outstanding under the Company's stock plans), to participate in subsequent issuances of equity securities of the Company (excluding those issuances listed at the end of the "Anti-dilution Provisions" section of this Term Sheet and shares issued in an IPO). In addition, should any [Major] Investor choose not to purchase its full pro rata share, the remaining [Major] Investors shall have the right to purchase the remaining pro rata shares.

*[Matters Requiring Preferred Director Approval:*

So long as the holders of Series A Preferred are entitled to elect a Director, the Company will not, without Board approval, which approval must include the affirmative vote of [at least one/each of] the then-seated Preferred Directors:

(i) make any loan or advance to, or own any stock or other securities of, any subsidiary or other corporation, partnership, or other entity unless it is wholly owned by the Company; (ii) make any loan or advance to any person, including, any employee or director, except advances and similar expenditures in the ordinary course of business [or under the terms of an employee stock or option plan approved by the Board of Directors]; (iii) guarantee any indebtedness except for trade accounts of the Company or any subsidiary arising in the ordinary course of business; [(iv) make any investment inconsistent with any

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<sup>20</sup> See commentary in introduction to Model Managements Rights Letter, explaining statutory basis of such letter.

investment policy approved by the Board of Directors]; (v) incur any aggregate indebtedness in excess of \$[\_\_\_\_\_] that is not already included in a Board-approved budget, other than trade credit incurred in the ordinary course of business; (vi) hire, fire, or change the compensation of the executive officers, including approving any option grants; (vii) change the principal business of the Company, enter new lines of business, or exit the current line of business; (viii) sell, assign, license, pledge or encumber material technology or intellectual property, other than licenses granted in the ordinary course of business; or (ix) enter into any corporate strategic relationship involving the payment contribution or assignment by the Company or to the Company of assets greater than [\$\_\_\_\_\_].]

*Non-Competition Agreements:*<sup>21</sup>

Founders and key employee will enter into a [one] year non-competition agreement in a form reasonably acceptable to the Investors.

*Non-Disclosure, Non-Solicitation and Developments Agreement:*

Each current, future and former founder, employee and consultant will enter into a non-disclosure, non-solicitation and proprietary rights assignment agreement in a form reasonably acceptable to the Investors.

*Board Matters:*

[Each Board Committee/the Nominating and Audit Committee shall include at least one Preferred Director.] Company to reimburse [nonemployee] directors for reasonable out-of-pocket expenses incurred in connection with attending Board meeting. The Company will bind D&O insurance with a carrier and in an amount satisfactory to the Board of Directors. Company to enter into Indemnification Agreement with each] Preferred Director with provisions benefitting their affiliated funds in form acceptable to such director. In the event the Company merges with another entity and is not the surviving entity, or transfers all of its assets, proper provisions shall be made so that successors of the Company assume the Company's obligations with respect to indemnification of Directors.

*Employee Stock Options:*

All [future] employee options to vest as follows: [25% after one year, with remaining vesting monthly over next 36 months].

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<sup>21</sup> Non-compete restrictions (other than in connection with the sale of a business) are prohibited in California, and may not be enforceable in other jurisdictions as well. Some states (*e.g.*, MA) require additional consideration in exchange for signing and/or enforcing a non-compete. Consider also whether it should be up to the Board on a case-by-case basis to determine whether any particular key employee is required to sign such an agreement. Non-competes typically have a one year duration, although state law may permit up to two years.

*[Limitations on Pre-CFIUS-Approval Exercise of Rights:]*<sup>22</sup>

Notwithstanding anything to the contrary contained in the Transaction Agreements, Investors and the Company agree that as of and following the initial Closing and until the CFIUS clearance is received, Investors shall not obtain (i) “control” (as defined in Section 721 of the Defense Production Act, as amended, including all implementing regulations thereof (the “DPA”)) of the Company, including the power to determine, direct or decide any important matters for the Company; (ii) access to any material nonpublic technical information (as defined in the DPA) in the possession of the Company; (iii) membership or observer rights on the Board of Directors of the Company or the right to nominate an individual to a position on the Board of Directors of the Company; or (iv) any involvement (other than through voting of shares) in substantive decision-making of the Company regarding (x) the use, development, acquisition, or release of any of the Company’s “critical technologies” (as defined in the DPA); (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA). To the extent that any term in the Transaction Agreements would grant any of these rights, (i)-(iv) to Investors, that term shall have no effect until such time as the CFIUS clearance is received.]

*[Springing CFIUS Covenant:]*<sup>23</sup>

[In the event that CFIUS requests or requires a filing/in the event of [ ]], Investors and the Company shall use reasonable best efforts to submit the proposed transaction to the Committee on Foreign Investment in the United States (“CFIUS”) and obtain CFIUS clearance or a statement from CFIUS that no further review is necessary with respect to the parties’ [notice/declaration]. Notwithstanding the previous sentence,

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<sup>22</sup> To be included if Investors intend to close the transaction in stages, with at least one stage occurring before CFIUS clearance is obtained. The foreign investor side letter language on point would override any aspect of the other transaction agreements that might, until CFIUS clearance is obtained, grant control of the Company or access to aspects of the Company that might create grounds for CFIUS jurisdiction.

<sup>23</sup> To be included if Investors believe that there is risk that CFIUS may request a filing of the transaction at some future date or that a CFIUS filing may be required in the event of some future occurrence (e.g., when the exit of another investor causes Investor to obtain control over the selection of a Board member). A springing CFIUS covenant provides certainty that all parties will proceed at CFIUS in orderly fashion. The further “notwithstanding” sentence ensures that while parties will cooperate to make the CFIUS filing, Investor will not be obligated to accept CFIUS-required conditions on the deal that might frustrate the purposes of its investment (i.e., the Investor can abandon the proposed investment); more robust mitigation commitment language may be desirable from the perspective of U.S. companies or U.S. investors seeking to limit foreign investors’ ability to abandon the transaction. For more information on the differences between electing to pursue a CFIUS notice vs. a CFIUS declaration and considering a reference to redemption rights, see footnote 16.

Investors shall have no obligation to take or accept any action, condition, or restriction as a condition of CFIUS clearance that would have a material adverse impact on the Company or the Investors' right to exercise control over the Company.]

*[Limitations on Information Rights:<sup>24</sup>*

Notwithstanding anything to the contrary contained in the Stock Purchase Agreement, the Charter, the Investors' Rights Agreement, the Right of First Refusal And Co-Sale Agreement, and the Voting Agreement (all of the agreements above together being the "**Transaction Agreements**"), Investors and the Company agree that as of and following [Closing/the initial Closing], Investors shall not obtain access to any material nonpublic technical information (as defined in Section 721 of the Defense Production Act, as amended, including all implementing regulations thereof (the "**DPA**")) in the possession of the Company.]

*Other Covenants:*

Consult the NVCA Model Investors' Rights Agreement for a number of other covenants the Investors may seek; Investors should include to the extent they feel any may be controversial if not raised at the Term Sheet stage.

### **RIGHT OF FIRST REFUSAL/CO-SALE AGREEMENT**

*Right of First Refusal/  
Right of Co-Sale (Take-Me-Along):*

Company first and Investors second will have a right of first refusal with respect to any shares of capital stock of the Company proposed to be transferred by current and future employees holding 1% or more of Company Common Stock (assuming conversion of Preferred Stock and whether then held or subject to the exercise of options), with a right of oversubscription for Investors of shares unsubscribed by the other Investors. Before any such person may sell Common Stock, he will give the Investors an opportunity to participate in such sale on a basis proportionate to the amount of securities held by the seller and those held by the participating Investors.<sup>25</sup>

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<sup>24</sup> To be included if Investors are considered foreign entities under the DPA and intend to make an investment outside the jurisdiction of CFIUS. This assumes that Investors intend not to obtain (i) a Board seat, observer, or nomination right, (ii) more than 10% of the voting rights in the Company, or (iii) control over decision-making at the Company, including with respect to Company technologies, data and infrastructure. If the Stock Purchase Agreements, Charter, and other Transaction Agreements contemplate an investment on those terms, then a disclaimer of information rights with respect to certain technical information should be the last necessary step to remove the transaction from CFIUS jurisdiction. Further markups of the other Transaction Agreements would be necessary to ensure that they are developed consistent with this intention.

<sup>25</sup> Certain exceptions are typically negotiated, e.g., estate planning or *de minimis* transfers. Investors may also seek ROFR rights with respect to transfers by investors, in order to be able to have some control over the composition of the investor group.

## VOTING AGREEMENT

*Board of Directors:* At the Closing, the Board of Directors shall consist of [\_\_\_\_\_] members comprised of (i) [name] as [the representative designated by [\_\_\_\_], as the lead Investor, (ii) [name] as the representative designated by the remaining Investors, (iii) [name] as the representative designated by the Common Stockholders, (iv) the person then serving as the Chief Executive Officer of the Company, and (v) [\_\_\_\_] person(s) who are not employed by the Company and who are mutually acceptable [to the other directors<sup>26</sup>].

*[Drag Along:* Holders of Preferred Stock and all current and future holders of greater than [1]% of Common Stock (assuming conversion of Preferred Stock and whether then held or subject to the exercise of options) shall be required to enter into an agreement with the Investors that provides that such stockholders will vote their shares in favor of a Deemed Liquidation Event or transaction in which 50% or more of the voting power of the Company is transferred and which is approved by [the Board of Directors] the Requisite Holders [and holders of a majority of the shares of Common Stock then held by employees of the Company (collectively with the Requisite Holders, the “**Electing Holders**”), so long as the liability of each stockholder in such transaction is several (and not joint) and does not exceed the stockholder’s pro rata portion of any claim and the consideration to be paid to the stockholders in such transaction will be allocated as if the consideration were the proceeds to be distributed to the Company’s stockholders in a liquidation under the Company’s then-current Charter, subject to customary limitations.]<sup>27</sup>

## OTHER MATTERS

*[Founders’ Stock:* Buyback right/vesting for [\_\_]% for first [12 months] after Closing; thereafter, right lapses in equal [monthly] increments over following [\_\_] months.]<sup>28</sup>

*[Existing Preferred Stock:<sup>29</sup>* The terms set forth above for the Series [\_\_] Preferred Stock are subject to a review of the rights, preferences and restrictions for the existing Preferred Stock. Any changes necessary to conform

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<sup>26</sup> Other formulations might be majority of Common then held by employees and majority of Preferred, for example.

<sup>27</sup> See [Section 3.3](#) of the Model Voting Agreement for a list of additional conditions that might be required in order for the drag-along to be invoked.

<sup>28</sup> Most founders’ shares are already subject to vesting; consider what level of vesting is appropriate and revise to marry up. Investors may also conclude not to change founder vesting.

<sup>29</sup> Necessary only if this is a later round of financing, and not the initial Series A round.

the existing Preferred Stock to this term sheet will be made at the Closing.]

*No-Shop/Confidentiality:*

The Company and the Investors agree to work in good faith expeditiously towards the Closing. The Company and the founders agree that they will not, for a period of [\_\_\_\_\_] days from the date these terms are accepted, take any action to solicit, initiate, encourage or assist the submission of any proposal, negotiation or offer from any person or entity other than the Investors relating to the sale or issuance, of any of the capital stock of the Company [or the acquisition, sale, lease, license or other disposition of the Company or any material part of the stock or assets of the Company] and shall notify the Investors promptly of any inquiries by any third parties in regards to the foregoing. The Company will not disclose the terms of this Term Sheet to any person other than employees, stockholders, members of the Board of Directors and the Company's accountants and attorneys and other potential Investors acceptable to [\_\_\_\_\_] , as lead Investor, without the written consent of the Investors (which shall not be unreasonably withheld, conditioned or delayed).

*Expiration:*

This Term Sheet expires on [\_\_\_\_\_] \_\_, 20\_\_] if not accepted by the Company by that date.

[Signature Page Follows]

EXECUTED this [ ] day of [\_\_\_\_\_], 20[ ].

[Signature Blocks]

SIGNATURE PAGE TO TERM SHEET

Last Updated July 2020

This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.

### *Preliminary Note*

*The Stock Purchase Agreement sets forth the basic terms of the purchase and sale of the preferred stock to the investors (such as the purchase price, closing date, conditions to closing) and identifies the other financing documents. Generally this agreement does not set forth either (1) the characteristics of the stock being sold (which are defined in the Certificate of Incorporation) or (2) the relationship among the parties after the closing, such as registration rights, rights of first refusal and co-sale and voting arrangements (these matters often implicate other persons than just the Company and the investors in this round of financing, and are usually embodied in separate agreements to which those others persons are parties, or in some cases by the Certificate of Incorporation). The main items of negotiation in the Stock Purchase Agreement are therefore the price and number of shares being sold, and the representations and warranties that the Company must make to the investors.*

## **SERIES A PREFERRED STOCK PURCHASE AGREEMENT**

THIS SERIES A PREFERRED STOCK PURCHASE AGREEMENT (this “**Agreement**”), is made as of is made as of [\_\_\_\_], 20[\_\_\_], by and among [\_\_\_\_], a Delaware corporation (the “**Company**”) and the investors listed on Exhibit A attached to this Agreement (each a “**Purchaser**” and together the “**Purchasers**”).

The parties hereby agree as follows:

1. Purchase and Sale of Preferred Stock.

1.1 Sale and Issuance of Preferred Stock.

(a) The Company shall have adopted and filed with the Secretary of State of the State of Delaware [on or before the Initial Closing<sup>1</sup> (as defined below)] the Amended and Restated Certificate of Incorporation in the form of Exhibit B attached to this Agreement (the “**Restated Certificate**”).<sup>2</sup>

(b) Subject to the terms and conditions of this Agreement, each Purchaser agrees to purchase at the [applicable] Closing (as defined below) and the Company agrees to sell and issue to each Purchaser at the [applicable] Closing that number of shares of Series A Preferred Stock, \$[\_\_\_] par value per share (the “**Series A Preferred Stock**”), set forth opposite each Purchaser’s name on Exhibit A, at a purchase price of \$[\_\_\_] per share. The shares

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<sup>1</sup> If only one closing is contemplated, references to “Initial Closing,” “each Closing,” “such Closing” etc. should be modified. If the transaction has a so-called “simultaneous sign and close” you can update the tense accordingly (“has adopted and filed”).

<sup>2</sup> Sometimes only a Certificate of Amendment is required.

of Series A Preferred Stock issued to the Purchasers pursuant to this Agreement shall be referred to in this Agreement as the “**Shares**.”

## 1.2 Closing; Delivery.

(a) The initial purchase and sale of the Shares shall take place remotely via the exchange of documents and signatures, at [\_\_\_\_] [\_.]m., on [\_\_\_\_\_, 20\_], or at such other time and place as the Company and the Purchasers mutually agree upon, orally or in writing (which time and place are designated as the “**Initial Closing**”).<sup>3</sup> In the event there is more than one closing, the term “**Closing**” shall apply to each such closing unless otherwise specified.

(b) At each Closing, the Company shall deliver to each Purchaser a certificate representing the Shares being purchased<sup>4</sup> by such Purchaser at such Closing against payment of the purchase price therefor by check payable to the Company, by wire transfer to a bank account designated by the Company, by cancellation or conversion of indebtedness or other convertible securities of the Company to Purchaser[, including interest<sup>5</sup>], or by any combination of such methods.

## 1.3 Sale of Additional Shares of Preferred Stock.

(a) After the Initial Closing, the Company may sell, on the same terms and conditions as those contained in this Agreement<sup>6</sup>, up to [\_\_\_\_\_] additional shares (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or similar recapitalization affecting such shares) of Series A Preferred Stock (the “**Additional Shares**”), to one (1) or more purchasers (the “**Additional Purchasers**”) [reasonably acceptable to Purchasers holding a [*specify percentage*] of the then outstanding Shares<sup>7</sup>], provided that (i) such subsequent sale is consummated prior to [ninety (90)] days after the Initial Closing (ii) each Additional Purchaser becomes a party to the Transaction Agreements (as defined below) (other than the

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<sup>3</sup> If the Agreement is signed prior to the Closing, this provision gives the parties flexibility to change the closing date as contingencies arise. As a practical matter, however, the Agreement is usually signed on the date of the Closing. This means that, until the Closing, everyone has an opportunity to back out of the deal.

<sup>4</sup> Note that the NVCA documents have been updated to provide for the possibility of uncertificated shares as well; alternative language is provided where applicable in all of the model documents.

<sup>5</sup> If some or all of the Purchasers will be converting previously issued notes to Shares, consider paying the interest in cash, if the terms of the notes permit this, to avoid last-minute re-computations if the closing is delayed. Note that cancellation of interest in return for stock may be a taxable event in the amount of the interest cancelled. Accordingly, some of the Purchasers may require payment of interest in cash to avoid imputation of income without the corresponding payment of cash to pay the tax.

<sup>6</sup> This Section 1.3(a) is intended to allow the Company to hold an Initial Closing once it has reached the minimum required to close, and then continue to raise capital over some agreed upon period on the same terms. This should not be confused with a “tranche” financing, where the amount committed to the financing round is not invested all at once up front but rather is invested in pre-specified “tranches,” usually dependent on the achievement of agreed upon milestone(s).

<sup>7</sup> The Company may want to limit this approval right to the larger Purchasers. As an alternative, the Agreement may specify that Additional Purchasers must be approved by the Board of Directors, including the directors elected by the Series A Preferred Stockholders.

Management Rights Letter), by executing and delivering a counterpart signature page to each of the Transaction Agreements[; and (iii) [\_\_\_\_\_], counsel for the Company, provides an opinion dated as of the date of such Closing that the offer, issuance, sale and delivery of the Additional Shares to the Additional Purchasers do not require registration under the Securities Act of 1933, as amended, or applicable state securities laws]. Exhibit A to this Agreement shall be updated to reflect the number of Additional Shares purchased at each such Closing and the parties purchasing such Additional Shares.

1.4 Use of Proceeds. In accordance with the directions of the Company's Board of Directors, as it shall be constituted in accordance with the Voting Agreement, the Company will use the proceeds from the sale of the Shares for product development and other general corporate purposes.]

1.5 Defined Terms Used in this Agreement. In addition to the terms defined above, the following terms used in this Agreement shall be construed to have the meanings set forth or referenced below.

(a) **"Affiliate"** means, with respect to any specified Person, any other Person who, directly or indirectly, controls, is controlled by, or is under common control with such Person, including, without limitation, any general partner, managing member, officer, director or trustee of such Person, or any venture capital fund or registered investment company now or hereafter existing that is controlled by one (1) or more general partners, managing members or investment advisers of, or shares the same management company or investment adviser with, such Person.

(b) **"Code"** means the Internal Revenue Code of 1986, as amended.

(c) **"Company Intellectual Property"** means all patents, patent applications, registered and unregistered trademarks, trademark applications, registered and unregistered service marks, service mark applications, tradenames, copyrights, trade secrets, domain names, [mask works,] information and proprietary rights and processes, similar or other intellectual property rights, subject matter of any of the foregoing, tangible embodiments of any of the foregoing, licenses in, to and under any of the foregoing, and in any and all such cases [that are owned or used by] [as are necessary to] the Company in the conduct of the Company's business as now conducted and as presently proposed to be conducted.

(d) **"Indemnification Agreement"** means the agreement between the Company and the director [and Purchaser Affiliates]<sup>8</sup> designated by any Purchaser entitled to designate a member of the Board of Directors pursuant to the Voting Agreement, dated as of the date of the Initial Closing, in the form of Exhibit D attached to this Agreement.

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<sup>8</sup> See Model Indemnification Agreement for discussion of the issue of expanding coverage to include not just VC designee director, but also the fund(s) making the investment. When the fund is also an indemnified party under the indemnification agreement, it may be appropriate for the D&O policy to include an endorsement extending coverage to the fund.

(e) “**Investors’ Rights Agreement**” means the agreement among the Company and the Purchasers [and certain other stockholders of the Company] dated as of the date of the Initial Closing, in the form of Exhibit E attached to this Agreement.

(f) “**Key Employee**” means any executive-level employee (including division director and vice president-level positions) as well as any employee or consultant who either alone or in concert with others develops, invents, programs or designs any Company Intellectual Property.<sup>9</sup>

(g) “**Knowledge**” including the phrase “**to the Company’s knowledge**” shall mean the actual knowledge [after reasonable investigation and assuming such knowledge as the individual would have as a result of the reasonable performance of his or her duties in the ordinary course] of the following officers: [specify names].<sup>10</sup> Additionally, for purposes of Section 2.8, the Company shall be deemed to have “knowledge” of a patent right if the Company has actual knowledge of the patent right or would be found to be on notice of such patent right as determined by reference to United States patent laws.

(h) “**Management Rights Letter**” means the agreement between the Company and [Purchaser], dated as of the date of the Initial Closing, in the form of Exhibit F attached to this Agreement.

(i) “**Material Adverse Effect**” means a material adverse effect on the business, assets (including intangible assets), liabilities, financial condition, property, prospects<sup>11</sup> or results of operations of the Company.

(j) “**Person**” means any individual, corporation, partnership, trust, limited liability company, association or other entity.

(k) “**Purchaser**” means each of the Purchasers who is initially a party to this Agreement and any Additional Purchaser who becomes a party to this Agreement at a subsequent Closing under Section 1.2(b).

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<sup>9</sup> In a Series A round at a high-tech start-up, it is likely that the only key employees in addition to management, if any, are those who are responsible for developing the Company’s key intellectual property assets. It may be simpler for these early-stage companies to list the Key Employees by name. In later rounds, it may be appropriate to include others, *e.g.*, important salespeople or consultants and define Key Employees by function (*e.g.*, division director).

<sup>10</sup> An important point of negotiation is often whether the Company will represent that a given fact (a) is true or (b) is true to the Company’s knowledge. Alternative (a) requires the Company to bear the entire risk of the truth or falsity of the represented fact, regardless whether the Company knew (or could have known) at the time of the representation whether or not the fact was true. Alternative (b) is preferable from the Company’s standpoint, since it holds the Company responsible only for facts of which it is actually aware.

<sup>11</sup> Since the prospects of high-tech start-up companies are by definition highly uncertain, the Company may resist the inclusion of the word “prospects” on the grounds that investors in a Series A financing are in the business of shouldering that risk.

(l) “**Right of First Refusal and Co-Sale Agreement**” means the agreement among the Company, the Purchasers, and certain other stockholders of the Company, dated as of the date of the Initial Closing, in the form of Exhibit G attached to this Agreement.

(m) “**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

(n) “**Transaction Agreements**” means this Agreement, the Investors’ Rights Agreement, the Management Rights Letter, the Right of First Refusal and Co-Sale Agreement, the Voting Agreement and [list any other agreements, instruments or documents entered into in connection with this Agreement].

(o) “**Voting Agreement**” means the agreement among the Company, the Purchasers and certain other stockholders of the Company, dated as of the date of the Initial Closing, in the form of Exhibit H attached to this Agreement.

2. Representations and Warranties of the Company.<sup>12</sup> The Company hereby represents and warrants to each Purchaser that, except as set forth on the Disclosure Schedule attached as Exhibit C to this Agreement, which exceptions shall be deemed to be part of the representations and warranties made hereunder, the following representations are true and complete as of the date of the [Initial][applicable] Closing, except as otherwise indicated. The Disclosure Schedule shall be arranged in sections corresponding to the numbered and lettered sections contained in this Section 2, and the disclosures in any section of the Disclosure Schedule shall qualify other sections in this Section 2 only to the extent it is readily apparent from a reading of the disclosure that such disclosure is applicable to such other sections.<sup>13</sup>

For purposes of these representations and warranties (other than those in Sections 2.2, 2.3, 2.4, 2.5, and 2.6), the term the “**Company**” shall include any subsidiaries of the Company, unless otherwise noted herein.

2.1 Organization, Good Standing, Corporate Power and Qualification.<sup>14</sup> The Company is a corporation duly organized, validly existing and in good standing under the laws of

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<sup>12</sup> The Voting Agreement contains representations by the Company and Purchasers relating to “bad actor” disqualifying events. If some or all of the Purchasers are not also entering into the Voting Agreement, consider adding similar representations to the Purchase Agreement in Sections 2 and 3.

<sup>13</sup> The purpose of the Company’s representations is primarily to create a mechanism to ensure full disclosure about the Company’s organization, financial condition and business to the investors. The Company is required to list any deviations from the representations on a Disclosure Schedule, the preparation and review of which drives the due diligence process on both sides of the deal. For subsequent closings, changes to the Disclosure Schedule are sometimes simply referenced on the Compliance Certificate. The introductory paragraph to this Section 2 may be modified to permit an update to the Disclosure Schedule that would be reasonably acceptable to each of the Purchasers. If this modification is made, a closing condition should be added to indicate that the updated Disclosure Schedule will be delivered and that each of the Purchasers may refuse to close if the updated Disclosure Schedule is not reasonably acceptable to that Purchaser. Some practitioners prefer to deliver the Disclosure Schedule separately, instead of as an exhibit to the Stock Purchase Agreement, so that the Disclosure Schedule will not have to be publicly filed in the event the Stock Purchase Agreement is filed as an exhibit to a public offering registration statement.

<sup>14</sup> The purpose of this representation is to ensure that basic corporate maintenance has been properly carried out by the Company. Note that the Company is required to disclose failure to qualify in other jurisdictions where it does

the State of Delaware and has all requisite corporate power and authority to carry on its business as now conducted and as presently proposed to be conducted. The Company is duly qualified to transact business and is in good standing in each jurisdiction in which the failure to so qualify would have a Material Adverse Effect.

## 2.2 Capitalization.<sup>15</sup>

(a) The authorized capital of the Company consists, immediately prior to the Initial Closing, of:

(i) [ ] shares of common stock, \$[ ] par value per share (the “**Common Stock**”), [ ] shares of which are issued and outstanding immediately prior to the Initial Closing. All of the outstanding shares of Common Stock have been duly authorized, are fully paid and nonassessable and were issued in compliance with all applicable federal and state securities laws.<sup>16</sup> [The Company holds no Common Stock in its treasury.]

(ii) [ ] shares of Preferred Stock, of which [ ] shares have been designated Series A Preferred Stock, none of which are issued and outstanding immediately prior to the Initial Closing. The rights, privileges and preferences of the Preferred Stock are as stated in the Restated Certificate and as provided by the Delaware General Corporation Law. [The Company holds no Preferred Stock in its treasury.]

(b) The Company has reserved [ ] shares of Common Stock for issuance to officers, directors, employees and consultants of the Company pursuant to its [*Plan Year*] Stock [Option] Plan duly adopted by the Board of Directors and approved by the Company stockholders (the “**Stock Plan**”). Of such reserved shares of Common Stock, [ ] shares have been issued pursuant to restricted stock purchase agreements, options to purchase [ ] shares have been granted and are currently outstanding, and [ ] shares of Common Stock remain available for issuance to officers, directors, employees and consultants

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business only if failure to do so could have a “Material Adverse Effect”; the purpose of this language is to eliminate the time and expense of doing a state-by-state analysis to determine whether the Company should technically be qualified. If the Company has material connections to states in which it is not qualified, these states must be investigated by counsel to determine whether qualification is necessary and whether there are potential adverse effects of having failed to qualify.

<sup>15</sup> Section 2.2 describes the Company’s capital structure and can be stated either immediately prior to or upon the Initial Closing of the financing. This description details any outstanding rights or privileges with respect to the Company’s securities. In later round financings, this description would also list any preemptive rights, co-sale rights and rights of first refusal granted to investors in prior rounds. In later round financings, consider adding representations that there have been no conversions of previously-issued preferred stock to common stock, the number of shares that would be outstanding on an as-converted-to-common stock basis and the current conversion ratios of each series of preferred stock.

<sup>16</sup> Note that the amendments to Rule 506 of Regulation D (“**Rule 506**”) effective September 23, 2013 added additional requirements for offerings made in reliance on the exception from registration provided by Rule 506. Those include the absence of “bad actors” and, for offerings involving general solicitation under Rule 506(c), the taking by the issuer of reasonable steps to confirm each purchaser’s accredited investor status. Accordingly, investors may wish to conduct additional due diligence on these matters.

pursuant to the Stock Plan. The Company has furnished to the Purchasers complete and accurate copies of the Stock Plan and forms of agreements used thereunder.

(c) [Section 2.2(c) of the Disclosure Schedule sets forth the capitalization of the Company immediately following the Initial Closing including the number of shares of the following: (i) issued and outstanding Common Stock, including, with respect to restricted Common Stock, vesting schedule and repurchase price; (ii) outstanding stock options, including vesting schedule and exercise price; (iii) shares of Common Stock reserved for future award grants under the Stock Plan; (iv) each series of Preferred Stock; and (v) warrants or stock purchase rights, if any.]<sup>17</sup> Except for (A) the conversion privileges of the Shares to be issued under this Agreement, (B) the rights provided in Section 4 of the Investors' Rights Agreement, and (C) the securities and rights described in Sections 2.2(a)(ii) and 2.2(b) of this Agreement and Section 2.2(c) of the Disclosure Schedule, there are no outstanding options, warrants, rights (including conversion or preemptive rights and rights of first refusal or similar rights) or agreements, orally or in writing, to purchase or acquire from the Company any shares of Common Stock or Series A Preferred Stock, or any securities convertible into or exchangeable for shares of Common Stock or Series A Preferred Stock. All outstanding shares of the Company's Common Stock and all shares of the Company's Common Stock underlying outstanding options are subject to (i) a right of first refusal in favor of the Company upon any proposed transfer (other than transfers for estate planning purposes); and (ii) a lock-up or market standoff agreement of not less than one hundred eighty (180) days following the Company's initial public offering pursuant to a registration statement filed with the Securities and Exchange Commission under the Securities Act.

(d) None of the Company's stock purchase agreements or stock option documents contains a provision for acceleration of vesting (or lapse of a repurchase right) or other changes in the vesting provisions or other terms of such agreement or understanding upon the occurrence of any event or combination of events, including, without limitation, in the case where the Company's Stock Plan is not assumed in an acquisition. The Company has never adjusted or amended the exercise price of any stock options previously awarded, whether through amendment, cancellation, replacement grant, repricing, or any other means. Except as set forth in the Restated Certificate, the Company has no obligation (contingent or otherwise) to purchase or redeem any of its capital stock.

(e) [409A. The Company believes in good faith that any "nonqualified deferred compensation plan" (as such term is defined under Section 409A(d)(1) of the Code and the guidance thereunder) under which the Company makes, is obligated to make or promises to make, payments (each, a "409A Plan") complies in all material respects, in both form and operation, with the requirements of Section 409A of the Code and the guidance thereunder. To the knowledge of the Company, no payment to be made under any 409A Plan is, or will be, subject to the penalties of Section 409A(a)(1) of the Code.]<sup>18</sup>

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<sup>17</sup> The vesting schedule disclosures may be better handled in due diligence. If removed, add the following vesting schedule representation in Section 2.2(d) as the first or second sentence: "All outstanding Common Stock (and all stock options) held by service providers are subject to a customary vesting schedule over four (4) years with a one (1) year cliff, except as set forth in Section 2.2(d) of the Disclosure Schedule."

<sup>18</sup> It should be noted that the consensus among the NVCA drafting group was that the 409A issues are better dealt

(f) The Company has obtained valid waivers of any rights by other parties to purchase any of the Shares covered by this Agreement.

2.3 Subsidiaries.<sup>19</sup> The Company does not currently own or control, directly or indirectly, any interest in any other corporation, partnership, trust, joint venture, limited liability company, association, or other business entity. The Company is not a participant in any joint venture, partnership or similar arrangement.

2.4 Authorization.<sup>20</sup> All corporate action required to be taken by the Company's Board of Directors and stockholders in order to authorize the Company to enter into the Transaction Agreements, and to issue the Shares at the Closing and the Common Stock issuable upon conversion of the Shares, has been taken[ or will be taken prior to the [applicable] Closing]. All action on the part of the officers of the Company necessary for the execution and delivery of the Transaction Agreements, the performance of all obligations of the Company under the Transaction Agreements to be performed as of the Closing, and the issuance and delivery of the Shares has been taken[ or will be taken prior to the [applicable] Closing]. The Transaction Agreements, when executed and delivered by the Company, shall constitute valid and legally binding obligations of the Company, enforceable against the Company in accordance with their respective terms except (i) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance, or other laws of general application relating to or affecting the enforcement of creditors' rights generally, (ii) as limited by laws relating to the availability of specific performance, injunctive relief, or other equitable remedies, or (iii) to the extent the indemnification provisions contained in the Investors' Rights Agreement and the Indemnification Agreement may be limited by applicable federal or state securities laws.

2.5 Valid Issuance of Shares.<sup>21</sup> The Shares, when issued, sold and delivered in accordance with the terms and for the consideration set forth in this Agreement, will be validly

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with as a diligence item, rather than a Company rep. Nevertheless, this rep is included here because it is in any case important that the issue be surfaced as part of the financing, to ensure that the Company is mindful of the obligations and potential penalties imposed by 409A as it makes future equity grants. Inserting the rep in the first draft, as a discussion item, is one way to ensure that the issue is not neglected.

<sup>19</sup> The purpose of this representation is to require the Company to fully disclose its structure, including other corporations, if any, that it controls. If the Company does have subsidiaries, you should (i) add to Section 2.2(f) a representation with respect to the subsidiaries of the Company modeled after Section 2.1 regarding the organization, good standing and qualification of each such subsidiary, and (ii) add a reference to subsidiaries where appropriate in Section 2. Some formulations include subsidiaries in the definition of the Company. This approach works if careful attention is given to representations where the effect of such inclusion requires additional language (for example, the representation in Section 2.2 would require either the exclusion of subsidiaries or a separate paragraph regarding the capitalization of subsidiaries).

<sup>20</sup> In certain jurisdictions, ancillary agreements executed in connection with the financing, such as noncompetition provisions or voting agreements, may be subject to some question regarding their enforceability, and the representation should be modified accordingly.

<sup>21</sup> The representations in Sections 2.4 and 2.5 are intended to ensure that the Company has taken all steps necessary to issue the preferred stock in accordance with applicable corporate law. This means that, before the closing, the Company must (A) obtain the requisite stockholder and board approvals to amend the Certificate of Incorporation and issue the stock; (B) file the Restated Certificate; and (C) obtain any other stockholder consents or waivers required pursuant to the Restated Certificate, Bylaws, and existing agreements with securityholders (most importantly, waivers

issued, fully paid and nonassessable and free of restrictions on transfer other than restrictions on transfer under the Transaction Agreements, applicable state and federal securities laws and liens or encumbrances created by or imposed by a Purchaser. Assuming the accuracy of the representations of the Purchasers in Section 3 of this Agreement and subject to the filings described in the Voting Agreement, the Shares will be issued in compliance with all applicable federal and state securities laws. The Common Stock issuable upon conversion of the Shares has been duly reserved for issuance, and upon issuance in accordance with the terms of the Restated Certificate, will be validly issued, fully paid and nonassessable and free of restrictions on transfer other than restrictions on transfer under the Transaction Agreements, applicable federal and state securities laws and liens or encumbrances created by or imposed by a Purchaser. Assuming the accuracy of the representations of the Purchasers in Section 3 of this Agreement and in the Voting Agreement, the Common Stock issuable upon conversion of the Shares will be issued in compliance with all applicable federal and state securities laws.

2.6 Governmental Consents and Filings. Assuming the accuracy of the representations made by the Purchasers in Section 3 of this Agreement, no consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any federal, state or local governmental authority is required on the part of the Company in connection with the consummation of the transactions contemplated by this Agreement, except for [(i) the filing of the Restated Certificate, which will have been filed as of the Initial Closing, and (ii)] filings pursuant to applicable securities laws, which have been made or will be made in a timely manner.

2.7 Litigation.<sup>22</sup> There is no claim, action, suit, proceeding, arbitration, complaint, charge or investigation<sup>23</sup> pending or to the Company's knowledge, currently threatened [in writing] (i) against the Company or any officer, director or Key Employee of the Company [arising out of their employment or board relationship with the Company][; or] (ii) [to the Company's knowledge,] that questions the validity of the Transaction Agreements or the right of the Company to enter into them, or to consummate the transactions contemplated by the Transaction Agreements[; or (iii) to the Company's knowledge, that would reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect]. Neither the Company nor, to the Company's knowledge, any of its officers, directors or Key Employees is a party or is named as subject to the provisions of any order, writ, injunction, judgment or decree of any court or government agency or instrumentality (in the case of officers, directors or Key Employees, such as would affect the Company). There is no action, suit, proceeding or investigation by the Company pending or which the Company intends to initiate. The foregoing includes, without

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to any existing rights of first offer or refusal). Section 2.5 also requires the Company to disclose any restrictions on transfer other than those contained in the Transaction Agreements (such as any contained in the Restated Certificate and Bylaws, or any preemptive rights contained in agreements with other securityholders).

<sup>22</sup> The litigation representation will often be unqualified in Series A financings. The bracketed materiality qualifiers are more common in later rounds of financings. In subsequent rounds it is no longer appropriate to have the Company make representations regarding directors (as opposed to employees), since directors will include investor representatives.

<sup>23</sup> It may be appropriate to include a knowledge qualifier as to investigations since it would be difficult for the Company to know of an investigation unless it had been notified. Some investors nevertheless feel the risk is appropriately borne by the Company.

limitation, actions, suits, proceedings or investigations pending or threatened in writing (or any basis therefor known to the Company) involving the prior employment of any of the Company's employees, their services provided in connection with the Company's business, any information or techniques allegedly proprietary to any of their former employers or their obligations under any agreements with prior employers.

## 2.8 Intellectual Property.<sup>24</sup>

(a) [The Company owns or possesses or [believes it] can acquire on commercially reasonable terms sufficient legal rights to all Company Intellectual Property without any known conflict with, or infringement of, the rights of others, including prior employees or consultants[, or academic or medical institutions with which any of them may be affiliated now or may have been affiliated in the past].] The Company has not received any communications alleging that the Company has violated, or by conducting its business, would violate any of the patents, trademarks, service marks, tradenames, copyrights, trade secrets, mask works or other proprietary rights or processes of any other Person.

(b) [To the Company's knowledge,] no product or service marketed or sold (or proposed to be marketed or sold) by the Company violates or will violate any license or infringes or will infringe any intellectual property rights of any other party.

(c) Other than with respect to commercially available software products under standard end-user object code license agreements, there are no outstanding options, licenses, agreements, claims, encumbrances or shared ownership interests of any kind relating to the Company Intellectual Property, nor is the Company bound by or a party to any options, licenses or agreements of any kind with respect to the patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information, proprietary rights and processes of any other Person.

(d) The Company has obtained and possesses valid licenses to use all of the software programs present on the computers and other software-enabled electronic devices that it owns or leases or that it has otherwise provided to its employees for their use in connection with the Company's business.

(e) Each employee and consultant has assigned to the Company all intellectual property rights he or she owns that are related to the Company's business as now conducted and as presently proposed to be conducted and all intellectual property rights that he, she or it solely or jointly conceived, reduced to practice, developed or made during the period of his, her or its employment or consulting relationship with the Company that (i) relate, at the time of conception, reduction to practice, development, or making of such intellectual property right, to

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<sup>24</sup> Section 2.8 gives the Purchasers assurances that the Company has the intellectual property rights necessary to conduct its business, or has disclosed its need to acquire further rights. Although Purchasers prefer an unqualified representation, this provision is often heavily negotiated, and may be impossible for the Company to make with certainty for a product in a very early stage of development. Under a common compromise, the Company provides an unqualified representation with respect to everything but patents, on the theory that potential patent conflicts cannot always be uncovered even after reasonable investigation, and that patent conflicts therefore represent an unknown risk that is fairly borne by both parties.

the Company's business as then conducted or as then proposed to be conducted, (ii) were developed on any amount of the Company's time or with the use of any of the Company's equipment, supplies, facilities or information or (iii) resulted from the performance of services for the Company. [To the Company's knowledge,] it will not be necessary to use any inventions of any of its employees or consultants (or Persons it currently intends to hire) made prior to their employment by the Company, including prior employees or consultants[, or academic or medical institutions with which any of them may be affiliated now or may have been affiliated in the past].

(f) Section 2.8(f) of the Disclosure Schedule lists all patents, patent applications, [registered] trademarks, trademark applications, service marks, service mark applications, tradenames, [registered] copyrights, and licenses to and under any of the foregoing, in each case owned by the Company.<sup>25</sup>

(g) The Company has not embedded, used or distributed any open source, copyleft or community source code (including but not limited to any libraries or code, software, technologies or other materials that are licensed or distributed under any General Public License, Lesser General Public License or similar license arrangement or other distribution model described by the Open Source Initiative at [www.opensource.org](http://www.opensource.org), collectively "**Open Source Software**") in connection with any of its products or services that are generally available or in development in any manner that would materially restrict the ability of the Company to protect its proprietary interests in any such product or service or in any manner that requires, or purports to require (i) any Company IP (other than the Open Source Software itself) be disclosed or distributed in source code form or be licensed for the purpose of making derivative works; (ii) any restriction on the consideration to be charged for the distribution of any Company IP; (iii) the creation of any obligation for the Company with respect to Company IP owned by the Company, or the grant to any third party of any rights or immunities under Company IP owned by the Company; or (iv) any other limitation, restriction or condition on the right of the Company with respect to its use or distribution of any Company IP.<sup>26</sup>

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<sup>25</sup> Lawyers representing investors may seek to use a broader list of items by requiring "Company Intellectual Property" to be set forth on the Disclosure Schedule. Note however that scheduling things like trade secrets may be challenging for the Company.

<sup>26</sup> This representation regarding non-use of open source software is intended to elicit disclosure of publicly available, third-party source code that the Company has incorporated, or intends to incorporate, into its products if such code is distributed under any license that imposes specified obligations upon the Company, and perhaps then only if the third party source code has been included in a product that the Company has released as, in most cases, the Purchasers should be concerned primarily about use of this sort of third-party source code. Much publicly available source code is distributed under licenses that permit it to be freely used and redistributed without imposing onerous obligations upon those that use it to develop their own software and listing all such code may be of little added value. Note also that the General Public License ("**GPL**") and other so-called "viral" open source licenses impose potentially onerous obligations upon licensees only if code distributed under them is incorporated into a product that is actually released to the general public. Some proprietary software companies experiment with code distributed under the GPL during the development process with no intention of retaining GPL code in the products ultimately released to their customers. (This experimentation typically is done in a separate "branch" of the source code of a product in development.) A more expansive open source representation, which would require substantially more scheduling, is as follows: "The Company has not embedded any open source, copyleft or community source code in any of its products generally available or in development, including but not limited to any libraries or code licensed under any General Public License, Lesser General Public License or similar license arrangement." The primary benefit of requiring this

(h) No government funding, facilities of a university, college, other educational institution or research center, or funding from third parties was used in the development of any Company Intellectual Property. No Person who was involved in, or who contributed to, the creation or development of any Company Intellectual Property, has performed services for the government, university, college, or other educational institution or research center in a manner that would affect Company's rights in the Company Intellectual Property.

2.9 Compliance with Other Instruments. The Company is not in violation or default (i) of any provisions of its Restated Certificate or Bylaws, (ii) of any instrument, judgment, order, writ or decree, (iii) under any note, indenture or mortgage, or (iv) under any lease, agreement, contract or purchase order to which it is a party or by which it is bound that is required to be listed on the Disclosure Schedule, or (v) [to its knowledge,] of any provision of federal or state statute, rule or regulation applicable to the Company, the violation of which would have a Material Adverse Effect. The execution, delivery and performance of the Transaction Agreements and the consummation of the transactions contemplated by the Transaction Agreements will not result in any such violation or be in conflict with or constitute, with or without the passage of time and giving of notice, either (i) a default under any such provision, instrument, judgment, order, writ, decree, contract or agreement; or (ii) an event which results in the creation of any lien, charge or encumbrance upon any assets of the Company or the suspension, revocation, forfeiture, or nonrenewal of any material permit or license applicable to the Company.

2.10 Agreements; Actions.<sup>27</sup>

(a) Except for the Transaction Agreements, there are no agreements, understandings, instruments, contracts or proposed transactions to which the Company is a party or by which it is bound that involve (i) obligations (contingent or otherwise) of, or payments to, the Company in excess of [\_\_\_\_\_], (ii) the license of any patent, copyright, trademark, trade secret or other proprietary right to or from the Company, (iii) the grant of rights to manufacture, produce, assemble, license, market, or sell its products to any other Person that limit the Company's exclusive right to develop, manufacture, assemble, distribute, market or sell its products, or (iv) indemnification by the Company with respect to infringements of proprietary rights.

(b) The Company has not (i) declared or paid any dividends, or authorized or made any distribution upon or with respect to any class or series of its capital stock, (ii) incurred any indebtedness for money borrowed or incurred any other liabilities individually in excess of [\_\_\_\_\_] or in excess of [\_\_\_\_\_] in the aggregate, (iii) made any loans or advances to any Person, other than ordinary advances for business expenses, or (iv) sold, exchanged or otherwise disposed of any of its assets or rights, other than in the ordinary course of business. For the purposes of (a) and (b) of this Section 2.10, all indebtedness, liabilities, agreements, understandings, instruments, contracts and proposed transactions involving the same

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expanded disclosure is that the investors can perform their own diligence on the open source software rather than relying on the Company to properly disclose against the narrower representation.

<sup>27</sup> Sections 2.7 and 2.10 require the Company to disclose material contracts as well as other agreements or arrangements that might be important from a due diligence standpoint regardless of dollar amount (such as intellectual property licenses or a proposed acquisition of the Company). The disclosure thresholds are negotiable.

Person (including Persons the Company has reason to believe are affiliated with each other) shall be aggregated for the purpose of meeting the individual minimum dollar amounts of such section.

(c) The Company is not a guarantor or indemnitor of any indebtedness of any other Person.

(d) [The Company has not engaged in the past [three (3) months] in any discussion with any representative of any Person regarding (i) a sale or exclusive license of all or substantially all of the Company's assets, or (ii) any merger, consolidation or other business combination transaction of the Company with or into another Person.]<sup>28</sup>

#### 2.11 Certain Transactions.<sup>29</sup>

(a) Other than (i) standard employee benefits generally made available to all employees, standard employee offer letters and Confidential Information Agreements (as defined below), (ii) standard director and officer indemnification agreements approved by the Board of Directors, (iii) the purchase of shares of the Company's capital stock and the issuance of options to purchase shares of the Company's Common Stock, in each instance, approved in the written minutes of the Board of Directors (previously provided to the Purchasers or their respective counsel), and (iv) the Transaction Documents, there are no agreements, understandings or proposed transactions between the Company and any of its officers, directors, consultants or Key Employees, or any Affiliate thereof.

(b) The Company is not indebted, directly or indirectly, to any of its directors, officers or employees or to their respective spouses or children or to any Affiliate of any of the foregoing, other than in connection with expenses or advances of expenses incurred in the ordinary course of business or employee relocation expenses and for other customary employee benefits made generally available to all employees. None of the Company's directors, officers or employees, or any members of their immediate families, or any Affiliate of the foregoing are, directly or indirectly, indebted to the Company[ or, [to the Company's knowledge], have any (i) material commercial, industrial, banking, consulting, legal, accounting, charitable or familial relationship with any of the Company's customers, suppliers, service providers, joint venture partners, licensees and competitors, (ii) direct or indirect ownership interest in any firm or corporation with which the Company is affiliated or with which the Company has a business relationship, or any firm or corporation which competes with the Company except that directors, officers, employees or stockholders of the Company may own stock in (but not exceeding two percent (2%) of the outstanding capital stock of) publicly traded companies that may compete with the Company; or (iii) financial interest in any [material] contract with the Company].<sup>30</sup>

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<sup>28</sup> This representation is not standard, but is sometimes requested by investors concerned that the Company might be considering a business combination transaction.

<sup>29</sup> This representation requires disclosure of situations which could create a conflict of interest. This is an item of particular concern in the first round of venture capital financing, since loans among the Company and its founders and their families (which may not be well documented) are especially common prior to the first infusion of outside capital.

<sup>30</sup> The bracketed portion of this sentence may be a broader representation than the Company is comfortable giving. In addition, it is appropriate to include directors throughout this section only at the first financing round. In subsequent

2.12 Rights of Registration and Voting Rights.<sup>31</sup> Except as provided in the Investors' Rights Agreement, the Company is not under any obligation to register under the Securities Act any of its currently outstanding securities or any securities issuable upon exercise or conversion of its currently outstanding securities. To the Company's knowledge, except as contemplated in the Voting Agreement, no stockholder of the Company has entered into any agreements with respect to the voting of capital shares of the Company.

2.13 Property. The property and assets that the Company owns are free and clear of all mortgages, deeds of trust, liens, loans and encumbrances, except for statutory liens for the payment of current taxes that are not yet delinquent and encumbrances and liens that arise in the ordinary course of business and do not materially impair the Company's ownership or use of such property or assets. With respect to the property and assets it leases, the Company is in compliance with such leases and holds a valid leasehold interest free of any liens, claims or encumbrances other than those of the lessors of such property or assets. The Company does not own any real property.

2.14 Financial Statements.<sup>32</sup> The Company has delivered to each Purchaser its [unaudited] [audited] financial statements as of [\_\_\_\_\_, 20\_] and for the fiscal year ended [\_\_\_\_\_, 20\_] [and its unaudited financial statements (including balance sheet, income statement and statement of cash flows) as of [\_\_\_\_\_, 20\_] (the "Balance Sheet Date") and for the [\_\_\_\_]-month period ended on the Balance Sheet Date (collectively, the "Financial Statements"). The Financial Statements have been prepared in accordance with generally accepted accounting principles ("GAAP") applied on a consistent basis throughout the periods indicated[, except that the unaudited Financial Statements may not contain all footnotes required by GAAP]. The Financial Statements fairly present in all material respects the financial condition and operating results of the Company as of the dates, and for the periods, indicated therein, subject in the case of the unaudited Financial Statements to normal year-end audit adjustments. Except as set forth in the Financial Statements, the Company has no material liabilities or obligations, contingent or otherwise, other than (i) liabilities incurred in the ordinary course of business subsequent to the Balance Sheet Date; (ii) obligations under contracts and commitments incurred in the ordinary course of business; and (iii) liabilities and obligations of a type or nature not required under GAAP to be reflected in the Financial Statements, which, in all such cases, individually and in the aggregate would not have a Material Adverse Effect. The Company maintains and will continue

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rounds the directors will include investor representatives, and it should not be incumbent on the Company to make disclosures as to them.

<sup>31</sup> Prior registration rights may conflict with those currently being negotiated among the investors and the Company. Therefore, any such rights must be carefully reviewed and any conflicts resolved. It is common to have any previous registration rights agreement amended to include the new investors, or replaced by a new agreement including the old and new investors and clarifying their rights relative to each other as well as the Company. It is preferable to have all registration rights relating to the Company's securities set forth in one document. Having several different sets of rights outstanding can be a significant (and confusing) complication when the Company goes public.

<sup>32</sup> For early stage companies without financial statements, it may be appropriate to have an alternative provision, such as the following: "Material Liabilities. The Company has no liability or obligation, absolute or contingent (individually or in the aggregate), except (i) obligations and liabilities incurred after the date of incorporation in the ordinary course of business that are not material, individually or in the aggregate, and (ii) obligations under contracts made in the ordinary course of business that would not be required to be reflected in financial statements prepared in accordance with GAAP."

to maintain a standard system of accounting established and administered in accordance with GAAP.

2.15 Changes.<sup>33</sup> Since the Balance Sheet Date there has not been:

(a) any change in the assets, liabilities, financial condition or operating results of the Company from that reflected in the Financial Statements, except changes in the ordinary course of business that have not caused, in the aggregate, a Material Adverse Effect;

(b) any damage, destruction or loss, whether or not covered by insurance, that would have a Material Adverse Effect;

(c) any waiver or compromise by the Company of a valuable right or of a material debt owed to it;

(d) any satisfaction or discharge of any lien, claim, or encumbrance or payment of any obligation by the Company, except in the ordinary course of business and the satisfaction or discharge of which would not have a Material Adverse Effect;

(e) any material change to a material contract or agreement by which the Company or any of its assets is bound or subject;

(f) any material change in any compensation arrangement or agreement with any employee, officer, director or stockholder;

(g) any resignation or termination of employment of any officer or Key Employee of the Company;

(h) any mortgage, pledge, transfer of a security interest in, or lien, created by the Company, with respect to any of its material properties or assets, except liens for taxes not yet due or payable and liens that arise in the ordinary course of business and do not materially impair the Company's ownership or use of such property or assets;

(i) any loans or guarantees made by the Company to or for the benefit of its employees, officers or directors, or any members of their immediate families, other than travel advances and other advances made in the ordinary course of its business;

(j) any declaration, setting aside or payment or other distribution in respect of any of the Company's capital stock, or any direct or indirect redemption, purchase, or other acquisition of any of such stock by the Company;

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<sup>33</sup> The purpose of this representation is to "bring down" the financial statements from the period covered thereby. Therefore, the blank in Section 2.14 should be filled with the last date covered by the financial statements provided to the investors, and any of the changes listed in this section must be disclosed on the Disclosure Schedule. While the itemization in this section serves as a useful due diligence checklist, this section can be replaced by a much shorter section reading simply, "[To the Company's knowledge], since [\_\_\_\_\_] there have been no events or circumstances of any kind that have had or could reasonably be expected to result in a Material Adverse Effect."

(k) any sale, assignment or transfer of any Company Intellectual Property that could reasonably be expected to result in a Material Adverse Effect;

(l) receipt of notice that there has been a loss of, or material order cancellation by, any major customer of the Company;

(m) [to the Company's knowledge,] any other event or condition of any character, other than events affecting the economy or the Company's industry generally, that could reasonably be expected to result in a Material Adverse Effect; or

(n) any arrangement or commitment by the Company to do any of the things described in this Section 2.15.

#### 2.16 Employee Matters.<sup>34</sup>

(a) [To the Company's knowledge,] none of its employees is obligated under any contract (including licenses, covenants or commitments of any nature) or other agreement, or subject to any judgment, decree or order of any court or administrative agency, that would materially interfere with such employee's ability to promote the interest of the Company or that would conflict with the Company's business. Neither the execution or delivery of the Transaction Agreements, nor the carrying on of the Company's business by the employees of the Company, nor the conduct of the Company's business as now conducted and as presently proposed to be conducted, will, [to the Company's knowledge,] conflict with or result in a breach of the terms, conditions, or provisions of, or constitute a default under, any contract, covenant or instrument under which any such employee is now obligated.

(b) The Company is not delinquent in payments to any of its employees, consultants, or independent contractors for any wages, salaries, commissions, bonuses, or other direct compensation for any service performed for it to the date hereof or amounts required to be reimbursed to such employees, consultants or independent contractors. The Company has complied in all material respects with all applicable state and federal equal employment opportunity laws and with other laws related to employment, including those related to wages, hours, worker classification and collective bargaining. The Company has withheld and paid to the appropriate governmental entity or is holding for payment not yet due to such governmental entity all amounts required to be withheld from employees of the Company and is not liable for any arrears of wages, taxes, penalties or other sums for failure to comply with any of the foregoing.

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<sup>34</sup> The following representation, which appeared in the prior version of this model SPA, can be inserted in Section 2.16 when greater detail is desired about the Company's service providers and their compensation arrangements: "As of the date hereof, the Company employs [\_\_\_\_\_] full-time employees and [\_\_\_\_\_] part-time employees and engages [\_\_\_\_\_] consultants or independent contractors. [Section 2.15(n)] of the Disclosure Schedule sets forth a detailed description of all compensation, including salary, bonus, severance obligations and deferred compensation paid or payable for each officer, employee, consultant and independent contractor of the Company who received compensation in excess of \$[\_\_\_\_\_] for the fiscal year ended [\_\_\_\_\_, 20\_] or is anticipated to receive compensation in excess of \$[\_\_\_\_\_] for the fiscal year ending [\_\_\_\_\_, 20\_]." Many practitioners prefer not to list employee compensation in the Disclosure Schedule. Employee compensation is a sensitive matter for many companies, and there is always a risk of the Disclosure Schedule inadvertently winding up in the wrong hands.

(c) To the Company’s knowledge, no Key Employee intends to terminate employment with the Company or is otherwise likely to become unavailable to continue as a Key Employee. The Company does not have a present intention to terminate the employment of any of the foregoing. The employment of each employee of the Company is terminable at the will of the Company. Except as set forth in Section 2.16(c)(i) of the Disclosure Schedule or as required by law, upon termination of the employment of any such employees, no severance or other payments will become due. Except as set forth in Section 2.16(c)(ii) of the Disclosure Schedule, the Company has no policy, practice, plan or program of paying severance pay or any form of severance compensation in connection with the termination of employment services.

(d) The Company has not made any representations regarding equity incentives to any officer, employee, director or consultant that are inconsistent with the share amounts and terms set forth in the minutes of meetings of (or actions taken by unanimous written consent by) the Company’s Board of Directors.

(e) Each former Key Employee whose employment was terminated by the Company has entered into an agreement with the Company providing for the full release of any claims against the Company or any related party arising out of such employment.

(f) Section 2.16(f) of the Disclosure Schedule sets forth each employee benefit plan maintained, established or sponsored by the Company, or which the Company participates in or contributes to, which is subject to the Employee Retirement Income Security Act of 1974, as amended (“**ERISA**”). The Company has made all required contributions and has no liability to any such employee benefit plan, other than liability for health plan continuation coverage described in Part 6 of Title I(B) of ERISA, and has complied in all material respects with all applicable laws for any such employee benefit plan.

(g) [The Company is not bound by or subject to (and none of its assets or properties is bound by or subject to) any written or oral, express or implied, contract, commitment or arrangement with any labor union, and no labor union has requested or, to the knowledge of the Company, has sought to represent any of the employees, representatives or agents of the Company. There is no strike or other labor dispute involving the Company pending, or to the Company’s knowledge, threatened, which could have a Material Adverse Effect, nor is the Company aware of any labor organization activity involving its employees.]

(h) [To the Company’s knowledge, none of the Key Employees or directors<sup>35</sup> of the Company has been (i) subject to voluntary or involuntary petition under the federal bankruptcy laws or any state insolvency law or the appointment of a receiver, fiscal agent or similar officer by a court for his or her business or property; (ii) convicted in a criminal proceeding or named as a subject of a pending criminal proceeding (excluding traffic violations and other minor offenses); (iii) subject to any order, judgment or decree (not subsequently reversed, suspended, or vacated) of any court of competent jurisdiction permanently or temporarily enjoining him or her from engaging, or otherwise imposing limits or conditions on his or her engagement in any securities, investment advisory, banking, insurance, or other type of business or acting as an officer or director of a public company; or (iv) found by a court of competent

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<sup>35</sup> See footnote 30 – same point as to investor directors.

jurisdiction in a civil action or by the Securities and Exchange Commission or the Commodity Futures Trading Commission to have violated any federal or state securities, commodities, or unfair trade practices law, which such judgment or finding has not been subsequently reversed, suspended, or vacated].<sup>36</sup>

2.17 Tax Returns and Payments. There are no federal, state, county, local or foreign taxes due and payable by the Company which have not been timely paid. There are no accrued and unpaid federal, state, county, local or foreign taxes of the Company which are due, whether or not assessed or disputed. There have been no examinations or audits of any tax returns or reports by any applicable federal, state, local or foreign governmental agency. The Company has duly and timely filed all federal, state, county, local and foreign tax returns required to have been filed by it and there are in effect no waivers of applicable statutes of limitations with respect to taxes for any year.<sup>37</sup>

2.18 Insurance.<sup>38</sup> The Company has in full force and effect insurance policies concerning such casualties as would be reasonable and customary for companies like the Company,<sup>39</sup> with extended coverage, sufficient in amount (subject to reasonable deductions) to allow it to replace any of its properties that might be damaged or destroyed.

2.19 Employee Agreements. Each current and former employee, consultant and officer of the Company has executed an agreement with the Company regarding confidentiality and proprietary information substantially in the form or forms delivered to the Purchasers or their respective counsel (the “**Confidential Information Agreements**”). No current or former Key Employee has excluded works or inventions from his or her assignment of inventions pursuant to such Key Employee’s Confidential Information Agreement. Each current and former Key Employee has executed a [non-competition and] non-solicitation agreement substantially in the form or forms delivered to the Purchasers or their respective counsel. The Company is not aware that any of its Key Employees is in violation of any agreement described in this Section 2.19.

2.20 Permits. The Company has all franchises, permits, licenses and any similar authority necessary for the conduct of its business, the lack of which could reasonably be expected to have a Material Adverse Effect. The Company is not in default in any material respect under any of such franchises, permits, licenses or other similar authority.

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<sup>36</sup> The following representation can be added to focus attention on whether there are any diligence issues related to prior workplace misconduct: “or (e) informed, following an internal investigation: (i) by the Company that such Key Employee or director has violated any Company policy regarding appropriate workplace behavior or any Company anti-harassment or anti-discrimination policy prohibiting discrimination and/or harassment at the Company, or (ii) by any prior employer of the violation of any substantially similar policy.”

<sup>37</sup> Consider PFIC/CFC representations as appropriate.

<sup>38</sup> The investors may negotiate life insurance coverage in favor of the Company for certain founders or other key employees. If such coverage is in effect prior to the closing, it may be appropriate to add to this representation a statement of the covered individuals and amount of coverage for each.

<sup>39</sup> Add specific coverages if concerned.

2.21 Corporate Documents. The Certificate of Incorporation and Bylaws of the Company as of the date of this Agreement are in the form provided to the Purchasers. The copy of the minute books of the Company provided to the Purchasers contains minutes of all meetings of directors and stockholders and all actions by written consent without a meeting by the directors and stockholders since the date of incorporation and accurately reflects in all material respects all actions by the directors (and any committee of directors) and stockholders.

2.22 [83(b) Elections]. To the Company's knowledge, all elections and notices under Section 83(b) of the Code have been or will be timely filed by all individuals who have acquired unvested shares of the Company's Common Stock].

2.23 [Real Property Holding Corporation].<sup>40</sup> The Company is not now and has never been a "United States real property holding corporation" as defined in the Code and any applicable regulations promulgated thereunder. The Company has filed with the Internal Revenue Service all statements, if any, with its United States income tax returns which are required under such regulations.]

2.24 [Environmental and Safety Laws]. Except as could not reasonably be expected to have a Material Adverse Effect [to the best of its knowledge] (a) the Company is and has been in compliance with all Environmental Laws; (b) there has been no release or [to the Company's knowledge] threatened release of any pollutant, contaminant or toxic or hazardous material, substance or waste or petroleum or any fraction thereof (each a "**Hazardous Substance**"), on, upon, into or from any site currently or heretofore owned, leased or otherwise used by the Company; (c) there have been no Hazardous Substances generated by the Company that have been disposed of or come to rest at any site that has been included in any published U.S. federal, state or local "superfund" site list or any other similar list of hazardous or toxic waste sites published by any governmental authority in the United States; and (d) there are no underground storage tanks located on, no polychlorinated biphenyls ("**PCBs**") or PCB-containing equipment used or stored on, and no hazardous waste as defined by the Resource Conservation and Recovery Act, as amended, stored on, any site owned or operated by the Company, except for the storage of hazardous waste in compliance with Environmental Laws. The Company has made available to the Purchasers true and complete copies of all material environmental records, reports, notifications, certificates of need, permits, pending permit applications, correspondence, engineering studies and environmental studies or assessments.]

For purposes of this Section 2.24, "**Environmental Laws**" means any law, regulation, or other applicable requirement relating to (a) releases or threatened release of Hazardous Substance; (b) pollution or protection of employee health or safety, public health or the environment; or (c) the

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<sup>40</sup> This representation is appropriate if there are foreign investors (*i.e.*, nonresident aliens) involved in the financing, since they are subject to the Foreign Investment Real Property Tax Act of 1980 ("**FIRPTA**"). Under FIRPTA, a transfer of an interest in a U.S. Real Property Holding Corporation (a "**USRPHC**") by a foreign investor is subject to tax withholding, notwithstanding the general rule that sales of stock by foreigners are not subject to U.S. taxation. A corporation is USRPHC if more than fifty percent (50%) of its assets consist of U.S. real property. While very few, if any, venture capital investors are USRPHCs, it is customary to provide this representation in order to ensure that any foreign investors will not be subject to tax withholding. Regardless of FIRPTA, if a foreign person or entity is, directly or indirectly, acquiring a ten percent (10%) or greater voting interest in the Company, it must file Form BE-13 with the U.S. Department of Commerce unless an exemption applies.

manufacture, handling, transport, use, treatment, storage, or disposal of Hazardous Substances.

2.25 Qualified Small Business Stock.<sup>41</sup> As of and immediately following the Closing: (i) the Company will be an eligible corporation as defined in Section 1202(e)(4) of the Code, (ii) the Company will not have made purchases of its own stock described in Code Section 1202(c)(3)(B) during the one (1) year period preceding the Initial Closing, except for purchases that are disregarded for such purposes under Treasury Regulation Section 1.1202-2, and (iii) the Company's aggregate gross assets, as defined by Code Section 1202(d)(2), at no time between its incorporation and through the Initial Closing have exceeded \$50 million, taking into account the assets of any corporations required to be aggregated with the Company in accordance with Code Section 1202(d)(3); provided, however, that in no event shall the Company be liable to the Purchasers or any other party for any damages arising from any subsequently proven or identified error in the Company's determination with respect to the applicability or interpretation of Code Section 1202, unless such determination shall have been given by the Company in a manner either grossly negligent or fraudulent.]

2.26 Small Business Concern.<sup>42</sup> The Company together with its "affiliates" (as that term is defined in Section 121.103 of Title 13 of the Code of Federal Regulations ("CFR"), is a ["small business concern"] ["smaller business"] within the meaning of the Small Business Investment Act of 1958, as amended (the "**Small Business Act**"), and the regulations promulgated thereunder, including [Section 121.301 of Title 13 of the CFR] [Section 107.710 of Title 13 of the CFR]. The information delivered to each Purchaser that is a licensed Small Business Investment Company (an "**SBIC Purchaser**") on SBA Forms 480, 652 and 1031 delivered in connection herewith is true and complete. The Company is not ineligible for financing by any SBIC Purchaser pursuant to Section 107.720 of the CFR. The Company acknowledges that each SBIC Purchaser is a Federal licensee under the Small Business Act.]

2.27 Foreign Corrupt Practices Act. Neither the Company nor any of its directors,<sup>43</sup> officers, employees or agents have, directly or indirectly, made, offered, promised or authorized any payment or gift of any money or anything of value to or for the benefit of any "foreign official" (as such term is defined in the U.S. Foreign Corrupt Practices Act of 1977, as amended (the "**FCPA**")), foreign political party or official thereof or candidate for foreign political office for the purpose of (i) influencing any official act or decision of such official, party or candidate, (ii) inducing such official, party or candidate to use his, her or its influence to affect any act or decision of a foreign governmental authority, or (iii) securing any improper advantage, in the case of (i), (ii) and (iii) above in order to assist the Company or any of its affiliates in obtaining

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<sup>41</sup> Section 1202 of the Code provides for a one hundred percent (100%) exclusion (subject to certain limitations) from taxable income of gains recognized on the disposition of certain stock in qualifying corporations that has been held for at least five (5) years. Although investors may ask for such a representation, companies may resist on the theory that the analysis regarding current compliance is complex, and that many elements of the test are outside the Company's control. In any event, compliance with numerous other requirements during the time the investor holds the stock is needed for the investor to qualify for the benefits of Section 1202. See also QSBS covenants in NVCA Model IRA.

<sup>42</sup> The Small Business Concern representation is only necessary if one (1) or more Purchasers is a SBIC.

<sup>43</sup> See footnote 30.

or retaining business for or with, or directing business to, any person. Neither the Company nor any of its directors, officers, employees or agents have made or authorized any bribe, rebate, payoff, influence payment, kickback or other unlawful payment of funds or received or retained any funds in violation of any law, rule or regulation. [The Company further represents that it has maintained, and has caused each of its subsidiaries and affiliates to maintain, systems of internal controls (including, but not limited to, accounting systems, purchasing systems and billing systems) and written policies to ensure compliance with the FCPA or any other applicable anti-bribery or anti-corruption law, and to ensure that all books and records of the Company accurately and fairly reflect, in reasonable detail, all transactions and dispositions of funds and assets.]<sup>44</sup> Neither the Company nor[, to the Company's knowledge,] any of its officers, directors or employees are the subject of any allegation, voluntary disclosure, investigation, prosecution or other enforcement action related to the FCPA or any other anti-corruption law (collectively, "**Enforcement Action**").]

2.28 [Data Privacy]. In connection with its collection, storage, use and/or disclosure of any information that constitutes "personal information," "personal data" or "personally identifiable information" as defined in applicable laws (collectively "**Personal Information**") by or on behalf of the Company, the Company is and has been[, to the Company's knowledge,] in compliance with (i) all applicable laws (including, without limitation, laws relating to privacy, data security, telephone and text message communications, and marketing by email or other channels) in all relevant jurisdictions, (ii) the Company's privacy policies [and public written statements regarding the Company's privacy or data security practices, and (iii) the requirements of any contract codes of conduct or industry standards[, including, without limitation, the Payment Card Industry Data Security Standard],<sup>45</sup> by which the Company is bound. The Company maintains and has maintained reasonable physical, technical, and administrative security measures and policies designed to protect all Personal Information owned, stored, used, maintained or controlled by or on behalf of the Company from and against unlawful, accidental or unauthorized access, destruction, loss, use, modification and/or disclosure. [To the extent the Company maintains or transmits protected health information, as defined under 45 C.F.R. § 160.103, the Company is in compliance with the applicable requirements of the Health Insurance Portability and Accountability Act of 1996, as amended by the Health Information Technology for Economic and Clinical Health Act, including all rules and regulations promulgated thereunder.] The Company is and has been[, to the Company's knowledge,] in compliance in all material respects with all laws relating to data loss, theft and breach of security notification obligations. [To the Company's knowledge, there has been no occurrence of (x) unlawful, accidental or unauthorized destruction, loss, use, modification or disclosure of or access to Personal Information owned, stored, used, maintained or controlled by or on behalf of the Company such that Privacy Requirements require or required the Company to notify government authorities, affected individuals or other parties of such occurrence or (y) unauthorized access to or disclosure of the

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<sup>44</sup> Many early stage companies may not have internal controls and policies in place and be unable to provide this representation. When this is the case, in lieu of a representation it might be appropriate for the Purchasers to request a post-closing covenant that the Company will put such controls in place.

<sup>45</sup> Intended for inclusion where the Company collects or processes payment card information, whether directly or through a third-party payment processor.

Company’s confidential information or trade secrets [that reasonably would be expected to result in a Material Adverse Effect.]]<sup>46</sup>

2.29 [Export Control Laws. The Company has conducted all export transactions in accordance with applicable provisions of United States export control laws and regulations, including the Export Administration Regulations, the International Traffic in Arms Regulations, the regulations administered by the Office of Foreign Assets Control of the U.S. Treasury Department, and the export control laws and regulations of any other applicable jurisdiction. Without limiting the foregoing: (a) the Company has obtained all export licenses and other approvals, timely filed all required filings and has assigned the appropriate export classifications to all products, in each case as required for its exports of products, software and technologies from the United States and any other applicable jurisdiction; (b) the Company is in compliance with the terms of all applicable export licenses, classifications, filing requirements or other approvals; (c) there are no pending or[, to the knowledge of the Company,] threatened claims against the Company with respect to such exports, classifications, required filings or other approvals; (d) there are no pending investigations related to the Company’s exports; and (e) there are no actions, conditions, or circumstances pertaining to the Company’s export transactions that would reasonably be expected to give rise to any material future claims.]

2.30 CFIUS Representations. The Company does not engage in (a) the design, fabrication, development, testing, production or manufacture of one (1) or more “critical technologies” within the meaning of the Defense Production Act of 1950, as amended, including all implementing regulations thereof (the “DPA”); (b) the ownership, operation, maintenance, supply, manufacture, or servicing of “covered investment critical infrastructure” within the meaning of the DPA (where such activities are covered by column 2 of Appendix A to 31 C.F.R. Part 800); or (c) the maintenance or collection, directly or indirectly, of “sensitive personal data” of U.S. citizens within the meaning of the DPA. The Company has no current intention of engaging in such activities in the future.<sup>47</sup>

2.31 [Preclinical Development and Clinical Trials.<sup>48</sup> The studies, tests, preclinical development and clinical trials, if any, conducted by or on behalf of the Company are

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<sup>46</sup> Comments to this Section 2.28 are generally intended to address new considerations under, and increased risks posed by, the new generation of privacy laws that have taken effect since the last update (*e.g.*, GDPR, CCPA).

<sup>47</sup> In this representation, the Company confirms that it is not a “TID U.S. business” within the meaning of that term pursuant to the regulations of the Committee on Foreign Investment in the United States (CFIUS). Companies that are not TID U.S. businesses are (a) not subject to either of the two CFIUS mandatory filing regimes and (b) not subject to CFIUS’s extended jurisdiction over non-controlling transactions. This representation does not wholly eliminate the possibility of CFIUS intervention – CFIUS has the discretionary right to elect to intervene in any transaction that grants a foreign party a control stake in a U.S. business (*e.g.*, an investment of ten percent (10%) or more, or that otherwise grants substantive rights of control) - but it should provide investors with significant comfort. Some Companies will not be able to make all parts of this representation but will be able to make part (a), the “no critical technologies” representation, which would eliminate the need to make the most common form of mandatory CFIUS filing. The final line of the representation will provide investors additional comfort that reevaluation at the time of the next capital raise is not required. Either this representation or the Purchaser representation in Section 3.9, below, is sufficient to show that no mandatory CFIUS filing applies.

<sup>48</sup> For life science transactions, consider adding the representations and warranties in this Section 2.31 pertaining to clinical trials and in Section 2.32 and 2.33 pertaining to FDA approval. These can be customized to development

being conducted in all material respects in accordance with experimental protocols, procedures and controls pursuant to accepted professional and scientific standards for products or product candidates comparable to those being developed by the Company and all applicable laws and regulations, including the Federal Food, Drug, and Cosmetic Act and 21 C.F.R. parts 50, 54, 56, 58, 312, and 812. The descriptions of, protocols for, and data and other results of, the studies, tests, development and trials conducted by or on behalf of the Company that have been furnished or made available to the Purchasers are accurate and complete. The Company is not aware of any studies, tests, development or trials the results of which reasonably call into question the results of the studies, tests, development and trials conducted by or on behalf of the Company, and the Company has not received any notices or correspondence from the U.S. Food and Drug Administration (“**FDA**”) or any other governmental entity or any institutional review board or comparable authority requiring the termination, suspension or material modification of any studies, tests, preclinical development or clinical trials conducted by or on behalf of the Company.]

2.32 [FDA Approvals]. The Company possesses all permits, licenses, registrations, certificates, authorizations, orders and approvals from the appropriate federal, state or foreign regulatory authorities necessary to conduct its business [as now conducted], including all such permits, licenses, registrations, certificates, authorizations, orders and approvals required by the FDA or any other federal, state or foreign agencies or bodies engaged in the regulation of drugs, pharmaceuticals, medical devices or biohazardous materials. The Company has not received any notice of proceedings relating to the suspension, modification, revocation or cancellation of any such permit, license, registration, certificate, authorization, order or approval. Neither the Company nor, to the Company’s knowledge, any officer, employee or agent of the Company has been convicted of any crime or engaged in any conduct that has previously caused or would reasonably be expected to result in (A) disqualification or debarment by the FDA under 21 U.S.C. Sections 335(a) or (b), or any similar law, rule or regulation of any other governmental entities, (B) debarment, suspension, or exclusion under any federal healthcare programs or by the General Services Administration, or (C) exclusion under 42 U.S.C. Section 1320a-7 or any similar law, rule or regulation of any governmental entities. Neither the Company nor any of its officers, employees, or, to the Company’s knowledge, any of its contractors or agents is the subject of any pending or threatened investigation by FDA pursuant to its “Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities” policy as stated at 56 Fed. Reg. 46191 (September 10, 1991) (the “**FDA Application Integrity Policy**”) and any amendments thereto, or by any other similar governmental entity pursuant to any similar policy. Neither the Company nor any of its officers, employees, contractors, and agents has committed any act, made any statement or failed to make any statement that would reasonably be expected to provide a basis for FDA to invoke the FDA Application Integrity Policy or for any similar governmental entity to invoke a similar policy. Neither the Company nor any of its officers, employees, or to the Company’s knowledge, any of its contractors or agents has made any materially false statements on, or material omissions from, any notifications, applications, approvals, reports and other submissions to FDA or any similar governmental entity.]

2.33 [FDA Regulation]. The Company is and has been in compliance with all applicable laws administered or issued by the FDA or any similar governmental entity, including the Federal Food, Drug, and Cosmetic Act and all other laws regarding developing, testing,

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stage of the Company.

manufacturing, marketing, distributing or promoting the products of the Company, or complaint handling or adverse event reporting.]

2.34 Disclosure.<sup>49</sup> The Company has made available to the Purchasers all the information [reasonably available to the Company] that the Purchasers have requested for deciding whether to acquire the Shares, including certain of the Company's projections describing its proposed business plan (the "Business Plan"). No representation or warranty of the Company contained in this Agreement, as qualified by the Disclosure Schedule, and no certificate furnished or to be furnished to Purchasers at the Closing contains any untrue statement of a material fact or[, to the Company's knowledge,] omits to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances under which they were made. The Business Plan was prepared in good faith; however, the Company does not warrant that it will achieve any results projected in the Business Plan. It is understood that this representation is qualified by the fact that the Company has not delivered to the Purchasers, and has not been requested to deliver, a private placement or similar memorandum or any written disclosure of the types of information customarily furnished to purchasers of securities.

3. Representations and Warranties of the Purchasers.<sup>50</sup> Each Purchaser hereby represents and warrants to the Company, severally and not jointly, that:

3.1 Authorization. The Purchaser has full power and authority to enter into the Transaction Agreements. The Transaction Agreements to which the Purchaser is a party, when executed and delivered by the Purchaser, will constitute valid and legally binding obligations of the Purchaser, enforceable against such Purchaser in accordance with their terms, except (a) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and any other laws of general application affecting enforcement of creditors' rights generally, and as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies, or (b) to the extent the indemnification provisions contained in the Investors' Rights Agreement may be limited by applicable federal or state securities laws.

3.2 Purchase Entirely for Own Account.<sup>51</sup> This Agreement is made with the Purchaser in reliance upon the Purchaser's representation to the Company, which by the

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<sup>49</sup> There is no consensus position on what should be included in the "Disclosure" representation. Purchasers will generally try to obtain an unqualified representation that none of the written information and business plan information provided to them by the Company contains a material misstatement or a materially misleading omission. The Company will generally try to resist such a broad representation, on the basis that a 10b-5 type representation, commonly found in an IPO prospectus, is inappropriate for a private financing in which a prospectus-type due diligence process has not occurred. The language shown represents a compromise position. It is important to note that the investors' right of recovery for a breach of this rep may be broader than under Rule SEC 10b-5, because in order to prevail in a Rule 10b-5 securities fraud action, the purchaser must establish that the seller acted with scienter. That is, a purely innocent misrepresentation normally does not give rise to civil liability under 10b-5. Another issue for a Series A investor to consider is the relative utility of this rep to the Series A investor at this stage, versus the risk of giving such a broad rep to investors in later rounds (who, in a worst case, may be looking for a rep on which to "hang their hat" if they decide they want out of the investment).

<sup>50</sup> The main purpose of the Purchasers' representations and warranties in Section 3 are to ensure that the investors meet the criteria for private placement exceptions under applicable state and federal securities laws.

<sup>51</sup> Occasionally, a venture capital fund will allow its employees and principals to co-invest through a special entity

Purchaser's execution of this Agreement, the Purchaser hereby confirms, that the Shares to be acquired by the Purchaser will be acquired for investment for the Purchaser's own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof, and that the Purchaser has no present intention of selling, granting any participation in, or otherwise distributing the same. By executing this Agreement, the Purchaser further represents that the Purchaser does not presently have any contract, undertaking, agreement or arrangement with any Person to sell, transfer or grant participations to such Person or to any third Person, with respect to any of the Shares. The Purchaser has not been formed for the specific purpose of acquiring the Shares.

3.3 Disclosure of Information. The Purchaser has had an opportunity to discuss the Company's business, management, financial affairs and the terms and conditions of the offering of the Shares with the Company's management and has had an opportunity to review the Company's facilities. The foregoing, however, does not limit or modify the representations and warranties of the Company in Section 2 of this Agreement or the right of the Purchasers to rely thereon.

3.4 Restricted Securities. The Purchaser understands that the Shares have not been, and will not be, registered under the Securities Act, by reason of a specific exemption from the registration provisions of the Securities Act which depends upon, among other things, the bona fide nature of the investment intent and the accuracy of the Purchaser's representations as expressed herein. The Purchaser understands that the Shares are "restricted securities" under applicable U.S. federal and state securities laws and that, pursuant to these laws, the Purchaser must hold the Shares indefinitely unless they are registered with the Securities and Exchange Commission and qualified by state authorities, or an exemption from such registration and qualification requirements is available. The Purchaser acknowledges that the Company has no obligation to register or qualify the Shares, or the Common Stock into which it may be converted, for resale except as set forth in the Investors' Rights Agreement. The Purchaser further acknowledges that if an exemption from registration or qualification is available, it may be conditioned on various requirements including, but not limited to, the time and manner of sale, the holding period for the Shares, and on requirements relating to the Company which are outside of the Purchaser's control, and which the Company is under no obligation and may not be able to satisfy. [The Purchaser acknowledges that the Company filed a registration statement for a public offering of its Common Stock, which was withdrawn effective [\_\_\_\_\_, 20\_\_]. The Purchaser understands that this offering is not intended to be part of the public offering, and that the Purchaser will not be able to rely on the protection of Section 11 of the Securities Act.<sup>52</sup>]

3.5 No Public Market. The Purchaser understands that no public market now exists for the Shares, and that the Company has made no assurances that a public market will ever exist for the Shares.

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as a nominee. Assuming these employees and principals meet the accreditation or sophistication standards necessary for the private placement exemption being relied on, and assuming the special purpose entity is not formed solely for the purpose of this investment, the language of this provision can be tailored to carve out that special entity.

<sup>52</sup> Include the bracketed language if the private placement exemption is based on the safe harbor in Rule 155(c) under the Securities Act for private offerings following an abandoned public offering.

3.6 Legends. The Purchaser understands that the Shares and any securities issued in respect of or exchange for the Shares, may be notated with one or all of the following legends:

“THE SHARES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AND HAVE BEEN ACQUIRED FOR INVESTMENT AND NOT WITH A VIEW TO, OR IN CONNECTION WITH, THE SALE OR DISTRIBUTION THEREOF. NO SUCH TRANSFER MAY BE EFFECTED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR AN OPINION OF COUNSEL IN A FORM SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE SECURITIES ACT OF 1933.”

(a) Any legend set forth in, or required by, the other Transaction Agreements.

(b) Any legend required by the securities laws of any state to the extent such laws are applicable to the Shares represented by the certificate, instrument, or book entry so legended.

3.7 Accredited Investor. The Purchaser is an accredited investor as defined in Rule 501(a) of Regulation D promulgated under the Securities Act.

3.8 Foreign Investors. If the Purchaser is not a United States person (as defined by Section 7701(a)(30) of the Code), the Purchaser hereby represents that it has satisfied itself as to the full observance of the laws of its jurisdiction in connection with any invitation to subscribe for the Shares or any use of this Agreement, including (i) the legal requirements within its jurisdiction for the purchase of the Shares, (ii) any foreign exchange restrictions applicable to such purchase, (iii) any governmental or other consents that may need to be obtained, and (iv) the income tax and other tax consequences, if any, that may be relevant to the purchase, holding, redemption, sale, or transfer of the Shares. The Purchaser’s subscription and payment for and continued beneficial ownership of the Shares will not violate any applicable securities or other laws of the Purchaser’s jurisdiction.

3.9 [CFIUS Foreign Person Status. The Purchaser is not a “foreign person” or a “foreign entity,” as defined in Section 721 of the Defense Production Act of 1950, as amended, including all implementing regulations thereof (the “DPA”). The Purchaser is not controlled by a “foreign person,” as defined in the DPA. The Purchaser does not permit any foreign person affiliated with the Purchaser, whether affiliated as a limited partner or otherwise, to obtain through the Purchaser any of the following with respect to the Company: (i) access to any “material nonpublic technical information” (as defined in the DPA) in the possession of the Company; (ii) membership or observer rights on the Board of Directors or equivalent governing body of the Company or the right to nominate an individual to a position on the Board of Directors or equivalent governing body of the Company; (iii) any involvement, other than through the voting of shares, in the substantive decision-making of the Company regarding (x) the use, development, acquisition, or release of any “critical technology” (as defined in the DPA), (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the

DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA); or (iv) “control” of the Company (as defined in the DPA).]<sup>53</sup>

3.10 No General Solicitation. Neither the Purchaser, nor any of its officers, directors, employees, agents, stockholders or partners has either directly or indirectly, including, through a broker or finder (a) engaged in any general solicitation, or (b) published any advertisement in connection with the offer and sale of the Shares.

3.11 Exculpation Among Purchasers. The Purchaser acknowledges that it is not relying upon any Person, other than the Company and its officers and directors, in making its investment or decision to invest in the Company. [The Purchaser agrees that neither any Purchaser nor the respective controlling Persons, officers, directors, partners, agents, or employees of any Purchaser shall be liable to any other Purchaser for any action heretofore taken or omitted to be taken by any of them in connection with the purchase of the Shares.<sup>54</sup>

3.12 Residence. If the Purchaser is an individual, then the Purchaser resides in the state or province identified in the address of the Purchaser set forth on Exhibit A; if the Purchaser is a partnership, corporation, limited liability company or other entity, then the office or offices of the Purchaser in which its principal place of business is identified in the address or addresses of the Purchaser set forth on Exhibit A.

3.13 [Consent to Promissory Note/SAFE Conversion and Termination. Each Purchaser, to the extent that such Purchaser, as set forth on the Schedule of Purchasers, is a holder of any promissory note or Simple Agreement for Future Equity (a “SAFE”) of the Company being converted and/or cancelled in consideration of the issuance hereunder of Shares to such Purchaser, hereby agrees that the entire amount owed to such Purchaser under such note or evidenced by such SAFE, as the case may be, is being tendered to the Company in exchange for the applicable Shares set forth on the Schedule of Purchasers, and effective upon the Company’s and such Purchaser’s execution and delivery of this Agreement, without any further action required by the Company or such Purchaser, such note or SAFE, as the case may be, and all obligations set forth therein shall be immediately deemed satisfied in full and terminated in their entirety, including, but not limited to, any security interest effected therein.<sup>55</sup> ]

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<sup>53</sup> In this representation, the Purchaser confirms that it is not a “foreign person” within the meaning of that term pursuant to the regulations of the Committee on Foreign Investment in the United States (CFIUS), and that it does not permit a foreign person to obtain CFIUS triggering rights by virtue of its investment. Purchasers that are not foreign persons and do not grant foreign persons such rights are not subject to CFIUS review in either its mandatory or elective forms. Either this representation or the Company representation in Section 2.31, above, is sufficient to show that no mandatory CFIUS filing applies.

<sup>54</sup> This provision is intended to protect the lead investor from claims of reliance by other investors.

<sup>55</sup> This eliminates any issues resulting from possible miscalculation of the amount owed to investor noteholders (miscalculations that can result from, for example, application of conversion discounts).

4. Conditions to the Purchasers' Obligations at Closing.<sup>56</sup> The obligations of each Purchaser to purchase Shares at the Initial Closing [or any subsequent Closing] are subject to the fulfillment, on or before such Closing, of each of the following conditions, unless otherwise waived:

4.1 Representations and Warranties. The representations and warranties of the Company contained in Section 2 shall be true and correct in all respects as of such Closing.

4.2 Performance. The Company shall have performed and complied with all covenants, agreements, obligations and conditions contained in this Agreement that are required to be performed or complied with by the Company on or before such Closing.

4.3 Compliance Certificate. The President of the Company shall deliver to the Purchasers at such Closing a certificate certifying that the conditions specified in Sections 4.1 and 4.2 have been fulfilled.

4.4 Qualifications. All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Shares pursuant to this Agreement shall be obtained and effective as of such Closing.

4.5 [Opinion of Company Counsel. The Purchasers shall have received from [\_\_\_\_\_], counsel for the Company, an opinion, dated as of the [Initial] Closing, in substantially the form of Exhibit I attached to this Agreement.]<sup>57</sup>

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<sup>56</sup> Section 4 contains the conditions which the Company must satisfy (or which must be waived) prior to closing in order to trigger the investors' obligation to purchase the shares; Section 5 contains the conditions the investors must satisfy to trigger the Company's obligation to sell the shares. With respect to each side, the essential requirements are (A) that all of the representations and warranties each makes in the Agreement are still true at the closing, and (B) that the other parties have entered into the other Transaction Agreements. If (as is typically the case) the Agreement contemplates a simultaneous signing and closing, consider deleting Sections 4.1 – 4.4, 4.6, 4.13, 4.14 and 4.17 (which, for the most part, can be covered by the representations in Section 2), and recasting the other sections of Section 4 as closing deliverables. If the Agreement contemplates multiple closings (e.g., milestone closings), attention should be given to determining what conditions must be satisfied in order to trigger the investors' obligations to purchase shares at subsequent closings. Sections 4.3 and 4.5 specifically require the Company to deliver at the Closing a Compliance Certificate and opinion of Company Counsel. In addition, it is generally necessary to deliver at the Closing (A) a Secretary's certificate certifying the Company's bylaws, board resolutions approving the transaction, and stockholder resolutions approving the Restated Certificate, (B) good standing certificates from the Secretary of State, (C) the certified Restated Certificate, and (D) waivers of any rights of first refusal triggered by the financing. These documents are therefore listed as "Closing Documents" on transaction checklists even though they are not specifically required to be delivered by the Agreement and are technically covered by the Compliance Certificate and the opinion of the Company's counsel. If the transaction is structured as a simultaneous signing and closing, the closing conditions serve as a convenient closing checklist, but are significantly diminished in importance. If there are to be subsequent closings, consider whether all of the closing conditions applicable to the Initial Closing should be applicable to the subsequent closing. It may be appropriate to include a separate, more limited set of closing conditions for a subsequent closing.

<sup>57</sup> Opinions can be expensive and time consuming; particularly for early stage deals, and as a result the parties might agree to forego a legal opinion as a condition precedent.

4.6 Board of Directors. As of the Initial Closing, the authorized size of the Board shall be [\_\_\_\_\_], and the Board shall be comprised of [\_\_\_\_\_].]

4.7 Indemnification Agreement. The Company shall have executed and delivered the Indemnification Agreements.

4.8 Investors' Rights Agreement. The Company and each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser's performance hereunder) [and the other stockholders of the Company named as parties thereto] shall have executed and delivered the Investors' Rights Agreement.

4.9 Right of First Refusal and Co-Sale Agreement. The Company, each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser's performance hereunder), and the other stockholders of the Company named as parties thereto shall have executed and delivered the Right of First Refusal and Co-Sale Agreement.

4.10 Voting Agreement. The Company, each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser's performance hereunder), and the other stockholders of the Company named as parties thereto shall have executed and delivered the Voting Agreement.

4.11 Restated Certificate. The Company shall have filed the Restated Certificate with the Secretary of State of Delaware on or prior to the Closing, which shall continue to be in full force and effect as of the Closing.

4.12 Secretary's Certificate. The Secretary of the Company shall have delivered to the Purchasers at the Closing a certificate certifying (i) the Certificate of Incorporation and Bylaws of the Company as in effect at the Closing, (ii) resolutions of the Board of Directors of the Company approving the Transaction Agreements and the transactions contemplated under the Transaction Agreements, and (iii) resolutions of the stockholders of the Company approving the Restated Certificate.

4.13 Proceedings and Documents. All corporate and other proceedings in connection with the transactions contemplated at the Closing and all documents incident thereto shall be reasonably satisfactory in form and substance to each Purchaser, and each Purchaser (or its respective counsel) shall have received all such counterpart original and certified or other copies of such documents as reasonably requested. Such documents may include good standing certificates.

4.14 Minimum Number of Shares at Initial Closing. A minimum of [\_\_\_\_\_] Shares must be sold at the Initial Closing.<sup>58</sup>

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<sup>58</sup> Sometimes the term sheet will specify that a minimum number of Shares must be sold at the Initial Closing. This also may be expressed as a minimum aggregate amount to be raised at the Initial Closing.

4.15 [Management Rights].<sup>59</sup> A Management Rights Letter shall have been executed by the Company and delivered to each Purchaser to whom it is addressed.]

4.16 [SBA Matters]. The Company shall have executed and delivered to each SBIC Purchaser a Size Status Declaration on SBA Form 480 and an Assurance of Compliance on SBA Form 652, and shall have provided to each such Purchaser information necessary for the preparation of a Portfolio Financing Report on SBA Form 1031.]

5. Conditions of the Company's Obligations at Closing. The obligations of the Company to sell Shares to the Purchasers at the Initial Closing [or any subsequent Closing] are subject to the fulfillment, on or before the Closing, of each of the following conditions, unless otherwise waived:

5.1 Representations and Warranties. The representations and warranties of each Purchaser contained in Section 3 shall be true and correct in all respects as of such Closing.

5.2 Performance. The Purchasers shall have performed and complied with all covenants, agreements, obligations and conditions contained in this Agreement that are required to be performed or complied with by them on or before such Closing.

5.3 Qualifications. All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Shares pursuant to this Agreement shall be obtained and effective as of the Closing.

5.4 Investors' Rights Agreement. Each Purchaser shall have executed and delivered the Investors' Rights Agreement.

5.5 Right of First Refusal and Co-Sale Agreement. Each Purchaser and the other stockholders of the Company named as parties thereto shall have executed and delivered the Right of First Refusal and Co-Sale Agreement.

5.6 Voting Agreement. Each Purchaser and the other stockholders of the Company named as parties thereto shall have executed and delivered the Voting Agreement.

5.7 [Minimum Number of Shares at Initial Closing]. A minimum of [\_\_\_\_\_] Shares must be sold at the Initial Closing.]

## 6. Miscellaneous.

6.1 Survival of Warranties. Unless otherwise set forth in this Agreement, the representations and warranties of the Company and the Purchasers contained in or made pursuant to this Agreement shall survive the execution and delivery of this Agreement and each Closing

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<sup>59</sup> See explanatory commentary in introduction to model Management Rights Letter.

and shall in no way be affected by any investigation or knowledge of the subject matter thereof made by or on behalf of the Purchasers or the Company.<sup>60</sup>

6.2 Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

6.3 Governing Law. This Agreement shall be governed by the internal law of [the State of Delaware],<sup>61</sup> without regard to conflict of law principles that would result in the application of any law other than the law of the [State of Delaware].

6.4 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*, www.docuSign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

6.5 Titles and Subtitles. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

6.6 Notices.

(a) General. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt, or (a) personal delivery to the party to be notified, (b) when sent, if sent by electronic mail during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient's next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) business day after deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on the signature page or Exhibit A, or to such e-mail address or address as subsequently modified by written notice given in accordance with this Section 6.6. If notice is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to [*Company Counsel Name and Address*] and if notice is given to the Purchasers, a copy (which copy shall not constitute notice) shall also be given to [*Purchaser Counsel Name and Address*].

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<sup>60</sup> Sometimes a limited survival period is negotiated.

<sup>61</sup> Some practitioners may select Delaware law as it has historically been the richest source for corporation law precedent. Other practitioners will prefer to choose the (non-Delaware) jurisdiction in which they are admitted to practice, if for no other reason than not having to retain Delaware counsel in the event they are called upon to give an enforceability opinion.

(b) Consent to Electronic Notice. Each Purchaser consents to the delivery of any stockholder notice pursuant to the Delaware General Corporation Law (the “DGCL”), as amended or superseded from time to time, by electronic transmission pursuant to Section 232 of the DGCL (or any successor thereto) at the e-mail address set forth below such Purchaser’s name on the signature page or Exhibit A, as updated from time to time by notice to the Company. To the extent that any notice given by means of electronic transmission is returned or undeliverable for any reason, the foregoing consent shall be deemed to have been revoked until a new or corrected e-mail address has been provided, and such attempted electronic notice shall be ineffective and deemed to not have been given. Each Purchaser agrees to promptly notify the Company of any change in its e-mail address, and that failure to do so shall not affect the foregoing.

6.7 No Finder’s Fees.<sup>62</sup> Each party represents that it neither is nor will be obligated for any finder’s fee or commission in connection with this transaction. Each Purchaser agrees to indemnify and to hold harmless the Company from any liability for any commission or compensation in the nature of a finder’s or broker’s fee arising out of this transaction (and the costs and expenses of defending against such liability or asserted liability) for which each Purchaser or any of its officers, employees or representatives is responsible. The Company agrees to indemnify and hold harmless each Purchaser from any liability for any commission or compensation in the nature of a finder’s or broker’s fee arising out of this transaction (and the costs and expenses of defending against such liability or asserted liability) for which the Company or any of its officers, employees or representatives is responsible.

6.8 Fees and Expenses. At the Closing, the Company shall pay the reasonable fees and expenses of [\_\_\_\_], the counsel for [name of lead Purchaser<sup>63</sup>], in an amount not to exceed, in the aggregate, \$[\_\_\_\_\_].

6.9 Attorneys’ Fees. If any action at law or in equity (including, arbitration) is necessary to enforce or interpret the terms of any of the Transaction Agreements, the prevailing party shall be entitled to reasonable attorneys’ fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.]

6.10 Amendments and Waivers. Except as set forth in Section 1.3(a) of this Agreement, any term of this Agreement may be amended, terminated or waived only with the written consent of the Company and [(i) the holders of at least [*specify percentage*] of the then-outstanding Shares[, or (ii) for an amendment, termination or waiver effected prior to the Initial Closing, Purchasers obligated to purchase [*specify percentage*] of the Shares to be issued at the Initial Closing]<sup>64</sup>. Any amendment or waiver effected in accordance with this Section 6.10 shall

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<sup>62</sup> This provision may need to be modified to fit the facts of a particular transaction.

<sup>63</sup> Typically, only the lead Purchaser is actually represented by counsel, with the other Purchasers relying on the lead Purchaser having conducted due diligence and hired legal counsel. Occasionally, counsel will represent the Purchasers as a group, or one (1) or more of the other Purchasers will have separate counsel, in which case this provision will need to be tailored accordingly.

<sup>64</sup> This clause is only necessary where the transaction is structured to be signed in advance of closing.

be binding upon the Purchasers and each transferee of the Shares (or the Common Stock issuable upon conversion thereof), each future holder of all such securities, and the Company.

6.11 Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision.

6.12 Delays or Omissions. No delay or omission to exercise any right, power or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power or remedy of such non-breaching or non-defaulting party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any party of any breach or default under this Agreement, or any waiver on the part of any party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

6.13 Entire Agreement. This Agreement (including the Exhibits hereto), the Restated Certificate and the other Transaction Agreements constitute the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

6.14 [Corporate Securities Law].<sup>65</sup> THE SALE OF THE SECURITIES WHICH ARE THE SUBJECT OF THIS AGREEMENT HAS NOT BEEN QUALIFIED WITH THE COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA AND THE ISSUANCE OF THE SECURITIES OR THE PAYMENT OR RECEIPT OF ANY PART OF THE CONSIDERATION THEREFOR PRIOR TO THE QUALIFICATION IS UNLAWFUL, UNLESS THE SALE OF SECURITIES IS EXEMPT FROM THE QUALIFICATION BY SECTION 25100, 25102 OR 25105 OF THE CALIFORNIA CORPORATIONS CODE. THE RIGHTS OF ALL PARTIES TO THIS AGREEMENT ARE EXPRESSLY CONDITIONED UPON THE QUALIFICATION BEING OBTAINED UNLESS THE SALE IS SO EXEMPT.]

6.15 Termination of Closing Obligations. Each Purchaser shall have the right to terminate its obligations to complete the [Initial] Closing [or the Second Closing], as the case may be, if prior to the occurrence thereof, any of the following occurs:

(a) the Company consummates a Deemed Liquidation Event (as defined in the Restated Certificate);

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<sup>65</sup> Section 6.14 is to be used for transactions governed by California law that are not relying on NSMIA for a state securities law exemption.

(b) the closing of an initial public offering of the Company, in which case the Purchasers may terminate their obligations hereunder immediately prior to, or contingent upon, such closing; or

(c) the Company (i) applies for or consents to the appointment of a receiver, trustee, custodian or liquidator of itself or substantially all of its property, (ii) becomes subject to the appointment of a receiver, trustee, custodian or liquidator of itself or substantially all of its property, (iii) makes an assignment for the benefit of creditors, (iv) institutes any proceedings under the United States Bankruptcy Code or any other federal or state bankruptcy, reorganization, receivership, insolvency or other similar law affecting the rights of creditors generally, or files a petition or answer seeking reorganization or an arrangement with creditors to take advantage of any insolvency law, or files an answer admitting the material allegations of a bankruptcy, reorganization or insolvency petition filed against it, or (v) becomes subject to any involuntary proceedings under the United States Bankruptcy Code or any other federal or state bankruptcy, reorganization, receivership, insolvency or other similar law affecting the rights of creditors generally, when proceeding is not dismissed within thirty (30) days of filing, or have an order for relief entered against it in any proceedings under the United States Bankruptcy Code.

6.16 Dispute Resolution. The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [*state*] and to the jurisdiction of the United States District Court for the District of [*judicial district*] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [*state*] or the United States District Court for the District of [*judicial district*], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

[WAIVER OF JURY TRIAL: EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS, THE SECURITIES OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL]

[*Alternative 1*<sup>66</sup>: Any unresolved controversy or claim arising out of or relating to this Agreement, except as (i) otherwise provided in this Agreement, or (ii) any such controversies or claims arising out of either party’s intellectual property rights for which a provisional remedy or equitable relief is sought, shall be submitted to arbitration by one arbitrator mutually agreed upon by the parties, and if no agreement can be reached within thirty (30) days after names of potential arbitrators have been proposed by the American Arbitration Association (the “AAA”), then by one arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by the AAA. The arbitration shall take place in [location], in accordance with the AAA rules then in effect, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof. There shall be limited discovery prior to the arbitration hearing as follows: (a) exchange of witness lists and copies of documentary evidence and documents relating to or arising out of the issues to be arbitrated, (b) depositions of all party witnesses, and (c) such other depositions as may be allowed by the arbitrators upon a showing of good cause. Depositions shall be conducted in accordance with the [state] Code of Civil Procedure, the arbitrator shall be required to provide in writing to the parties the basis for the award or order of such arbitrator, and a court reporter shall record all hearings, with such record constituting the official transcript of such proceedings.]

[Each party will bear its own costs in respect of any disputes arising under this Agreement.] [The prevailing party shall be entitled to reasonable attorney’s fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.] Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [state] having subject matter jurisdiction.]

[*Alternative 2*:<sup>67</sup>

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a

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<sup>66</sup> Some lawyers prefer to include a binding arbitration provision as the sole means of dispute resolution on the theory that arbitration is confidential and may be less expensive and more efficient. Some investors, however, dislike arbitration because the result cannot be appealed, and the arbitrator(s) is not bound to follow case law and precedent.

<sup>67</sup> This arbitration provision is offered as an alternative to the AAA provision for parties that would prefer to resolve disputes under the Delaware Rapid Arbitration Act. The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the Act provides for a truncated “summary” proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate. By statute, this proceeding must be concluded no more than thirty (30) days after its initiating filing is served, and the jurisdiction of the Court is highly limited. Second, the Act divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the Act vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is “substantive” or “procedural” does not apply to arbitrations under the Act, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court. Third, the Act vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed, thus avoiding the need for parallel proceedings to compel or enjoin arbitration. Finally, the Act provides that, absent an agreement otherwise, all matters must be finally determined within one hundred and twenty (120) days of the arbitrator’s acceptance of appointment (which deadline may be extended to one hundred and eighty (180) days, but no longer, by unanimous consent of the parties). Furthermore, the Act imposes a financial penalty on an arbitrator who does not decide the matter within the allotted

“**Dispute**”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 Del. C § 5801, et seq. (the “**DRAA**”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “**Arbitration**”) in accordance with this Section 6.15, and each party represents and warrants that it is not a “consumer” as such term is defined in 6 Del. C. § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in sections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 6.15 and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.<sup>68</sup> To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in such location as the parties and the Arbitrator may agree.<sup>69</sup>

(d) The Arbitration shall be presided over by one (1) arbitrator (the “**Arbitrator**”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “**Replacement Arbitrator**”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.<sup>70</sup>

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timeframe: the forfeiture of the arbitrator’s fees. The Act makes challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The Act also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

<sup>68</sup> The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this Section (b).

<sup>69</sup> The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware. This simply means that Delaware law governs the arbitration, wherever it occurs.

<sup>70</sup> The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.<sup>71</sup>

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.<sup>72</sup>

(g) The arbitral award (the “**Award**”) shall (i) be rendered within [one hundred and twenty (120)] days after the Arbitrator’s acceptance of his or her appointment;<sup>73</sup> (ii) be delivered in writing; (iii) state the reasons for the Award;<sup>74</sup> (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;<sup>75</sup> and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section 6.15 shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.<sup>76</sup>

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<sup>71</sup> The DRAA empowers the parties to include one, both or neither of the provisions set forth in Section (e). If the parties wish to proceed without discovery, neither of the sentences in Section (e) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The Act would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The Act contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

<sup>72</sup> The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration.

<sup>73</sup> The parties may specify a longer period for the arbitration. If they do not do so, the one hundred and twenty (120)day period of the DRAA is the default, and such period may be extended by no more than an additional sixty (60) days, and then only upon consent of all parties to the arbitration.

<sup>74</sup> A reasoned award is not required by the Act, but may be required by the parties’ contract.

<sup>75</sup> The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Section (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator’s award, in which case clause (iv) of Section (g) should not be included.

<sup>76</sup> Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,<sup>77</sup> and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, [any third-party discovery proceedings, including any discovery obtained pursuant thereto,]<sup>78</sup> and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.<sup>79</sup> In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.<sup>80</sup>

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “**Respondent**”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of res judicata, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section 6.15, if any amendment to the Act is enacted after the date of this Agreement, and such

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<sup>77</sup> This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

<sup>78</sup> Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in Section (e), above.

<sup>79</sup> Clause (v) would be excluded in the event that third-party discovery was not provided for in Section (e) above.

<sup>80</sup> The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

amendment would render any provision of this Section 6.15 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 6.15 shall be enforced to the fullest extent permitted by law.

(1) [Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.<sup>81</sup>] [*Alternative A:*<sup>82</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>83</sup> The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.<sup>84</sup>] [*Alternative B:*<sup>85</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>86</sup> The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.]]

6.17 [No Commitment for Additional Financing]. The Company acknowledges and agrees that no Purchaser has made any representation, undertaking, commitment or agreement to provide or assist the Company in obtaining any financing, investment or other assistance, other than the purchase of the Shares as set forth herein and subject to the conditions set forth herein. In addition, the Company acknowledges and agrees that (i) no statements, whether written or oral, made by any Purchaser or its representatives on or after the date of this Agreement shall create an obligation, commitment or agreement to provide or assist the Company in obtaining any financing or investment, (ii) the Company shall not rely on any such statement by any Purchaser or its representatives, and (iii) an obligation, commitment or agreement to provide or assist the Company in obtaining any financing or investment may only be created by a written agreement, signed by such Purchaser and the Company, setting forth the terms and conditions of such financing or investment and stating that the parties intend for such writing to be a binding obligation or agreement. Each Purchaser shall have the right, in its sole and absolute discretion, to refuse or decline to participate in any other financing of or investment in the Company, and shall have no

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<sup>81</sup> The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of Section (g).

<sup>82</sup> The following is an alternative appellate provision in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA.

<sup>83</sup> In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one (1) or more senior Delaware lawyers.

<sup>84</sup> This provision contemplates a scope of challenge to the Arbitrator's final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

<sup>85</sup> The following is an alternative appellate provision for use in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.

<sup>86</sup> In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one (1) or more senior Delaware lawyers.

obligation to assist or cooperate with the Company in obtaining any financing, investment or other assistance.]

6.18 [Waiver of Conflicts]. Each party to this Agreement acknowledges that [insert name of Company counsel], counsel for the Company, may have in the past performed, and may continue to or in the future perform, legal services for certain of the Purchasers in matters that are similar, but not substantially related, to the transactions described in this Agreement, including the representation of such Purchasers in venture capital financings and other matters. Accordingly, each party to this Agreement hereby acknowledges that (a) they have had an opportunity to ask for information relevant to this disclosure, and (b) [insert name of Company counsel] represents only the Company with respect to the Agreement and the transactions contemplated hereby. The Company gives its informed consent to [insert name of Company counsel]'s representation of the Purchasers in matters not substantially related to this Agreement, and the Purchasers give their informed consent to [insert name of Company counsel]'s representation of the Company in connection with this Agreement and the transactions contemplated hereby.]<sup>87</sup>

[Signature Page Follows]

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<sup>87</sup> Some investors prefer to be carved out of this waiver and to address any potential conflicts of interest and possible waivers on a transaction by transaction basis.

IN WITNESS WHEREOF, the parties have executed this Series A Preferred Stock Purchase Agreement as of the date first written above.

COMPANY:

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(print)

Title: \_\_\_\_\_

Address:

IN WITNESS WHEREOF, the parties have executed this Series A Preferred Stock Purchase Agreement as of the date first written above.

PURCHASERS:

\_\_\_\_\_  
(Print Name of Purchaser)

By:\_\_\_\_\_

Name:\_\_\_\_\_  
(print)

Title:\_\_\_\_\_

## **EXHIBITS**

- Exhibit A - **SCHEDULE OF PURCHASERS**
- Exhibit B - **FORM OF AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION**
- [Exhibit C - **DISCLOSURE SCHEDULE**]
- Exhibit D - **FORM OF INDEMNIFICATION AGREEMENT**
- Exhibit E - **FORM OF INVESTORS' RIGHTS AGREEMENT**
- Exhibit F - **FORM OF MANAGEMENT RIGHTS LETTER**
- Exhibit G - **FORM OF RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT**
- Exhibit H - **FORM OF VOTING AGREEMENT**
- [Exhibit I - **FORM OF LEGAL OPINION OF COMPANY COUNSEL**]

EXHIBIT A

**SCHEDULE OF PURCHASERS**

EXHIBIT B

**FORM OF AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION**

## EXHIBIT C

### **DISCLOSURE SCHEDULE**

This Disclosure Schedule is made and given pursuant to Section 2 of the Series A Preferred Stock Purchase Agreement, dated as of [date] (the “**Agreement**”), between [Company name] (the “**Company**”) and the Purchasers listed on Schedule A thereto. All capitalized terms used but not defined herein shall have the meanings as defined in the Agreement, unless otherwise provided. The section numbers below correspond to the section numbers of the representations and warranties in the Agreement; provided, however, that any information disclosed herein under any section number shall be deemed to be disclosed and incorporated into any other section number under the Agreement where such disclosure would be appropriate and such appropriateness is reasonably apparent from the face of such disclosure. Nothing in this Disclosure Schedule is intended to broaden the scope of any representation or warranty contained in the Agreement or to create any covenant. Inclusion of any item in this Disclosure Schedule (1) does not represent a determination that such item is material or establish a standard of materiality, (2) does not represent a determination that such item did not arise in the ordinary course of business, (3) does not represent a determination that the transactions contemplated by the Agreement require the consent of third parties, and (4) shall not constitute, or be deemed to be, an admission to any third party concerning such item. This Disclosure Schedule includes brief descriptions or summaries of certain agreements and instruments, copies of which are available upon reasonable request. Such descriptions do not purport to be comprehensive, and are qualified in their entirety by reference to the text of the documents described, true and complete copies of which have been provided to the Purchasers or their respective counsel.

EXHIBIT D

**FORM OF INDEMNIFICATION AGREEMENT**

EXHIBIT E

**FORM OF INVESTORS' RIGHTS AGREEMENT**

EXHIBIT F

**FORM OF MANAGEMENT RIGHTS LETTER**

EXHIBIT G

**FORM OF RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT**

EXHIBIT H

**FORM OF VOTING AGREEMENT**

EXHIBIT I

**FORM OF LEGAL OPINION OF [COMPANY COUNSEL]**

This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.

## [AMENDED AND RESTATED] RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT

THIS [AMENDED AND RESTATED] RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT (this “**Agreement**”), is made as of [\_\_\_\_], 20[\_\_\_] by and among [\_\_\_\_], a [Delaware] corporation (the “**Company**”), the Investors (as defined below) listed on Schedule A and the Key Holders<sup>1</sup> (as defined below) listed on Schedule B.

[Alternative 1:<sup>2</sup>

**WHEREAS**, each Key Holder is the beneficial owner of shares of Capital Stock, or of options to purchase Common Stock;

**WHEREAS**, the Company and the Investors are parties to that certain [Series A Preferred Stock] Purchase Agreement, of even date herewith (the “**Purchase Agreement**”), pursuant to which the Investors have agreed to purchase shares of the Series A Preferred Stock of the Company, par value \$\_\_ per share (“**Series A Preferred Stock**”); and

**WHEREAS**, the Key Holders and the Company desire to further induce the Investors to purchase the Series A Preferred Stock;]

[Alternative 2:<sup>3</sup>

**WHEREAS**, each Key Holder is the beneficial owner of shares of Capital Stock, or of options to purchase Common Stock;

**WHEREAS**, the Company, the Key Holders and certain of the Investors (the “**Existing Investors**”) previously entered into [a][an] [Amended and Restated] Right of First Refusal and Co-Sale Agreement, dated [\_\_\_\_ \_\_, 20\_\_\_\_] (the “**Prior Agreement**”), in connection with the purchase of shares of Series [\_\_\_] Preferred Stock of the Company, par value \$\_\_ per share (“**Series [\_\_\_] Preferred Stock**”);

**WHEREAS**, the Key Holders, the Existing Investors and the Company desire to induce certain of the Investors to purchase shares of Series [\_\_\_] Preferred Stock of the Company, par value \$\_\_ per share (“**Series [\_\_\_] Preferred Stock**”), pursuant to that certain Series [\_\_\_] Preferred Stock Purchase Agreement dated as of the date hereof by and among the Company and

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<sup>1</sup> In most cases investors will want the term “Key Holders” to include major common stock or option holders in addition to the individuals who actually founded the Company.

<sup>2</sup> This first set of recitals assumes that this Agreement is being entered into in connection with the sale of the Company’s first series of preferred stock.

<sup>3</sup> This second set of recitals assumes that a preexisting co-sale agreement is being superseded. It contemplates two (2) different series of preferred stock. Appropriate modifications to the form will be required based on the actual series of preferred stock outstanding and the relative right of such series.

such Investors (the “**Purchase Agreement**”) by [amending and restating][terminating] the Prior Agreement in its entirety to provide the Investors with the rights and privileges as set forth herein.]

**NOW, THEREFORE**, the Company, the Key Holders [and][,] the Investors [including the Existing Investors each hereby agree that the Prior Agreement is hereby amended and restated in its entirety by this Agreement, and the parties hereto further] agree as follows:

1. Definitions.

1.1 “**Affiliate**” means, with respect to any specified Investor, any other Investor who directly or indirectly, controls, is controlled by or is under common control with such Investor, including, without limitation, any general partner, managing member, officer, director or trustee of such Investor, or any venture capital fund or other investment fund now or hereafter existing which is controlled by one (1) or more general partners, managing members or investment advisers of, or shares the same management company or investment adviser with, such Investor.

1.2 “**Board of Directors**” means the board of directors of the Company.

1.3 “**Capital Stock**” means (a) shares of Common Stock and Preferred Stock (whether now outstanding or hereafter issued in any context), (b) shares of Common Stock issued or issuable upon conversion of Preferred Stock, and (c) shares of Common Stock issued or issuable upon exercise or conversion, as applicable, of stock options, warrants or other convertible securities of the Company, in each case now owned or subsequently acquired by any Key Holder, any Investor, or their respective successors or permitted transferees or assigns. For purposes of the number of shares of Capital Stock held by an Investor or Key Holder (or any other calculation based thereon), all shares of Preferred Stock shall be deemed to have been converted into Common Stock at the then-applicable conversion ratio.

1.4 “**Change of Control**” means a transaction or series of related transactions in which a person, or a group of related persons, acquires from stockholders of the Company shares representing more than fifty percent (50%) of the outstanding voting power of the Company.

1.5 “**Common Stock**” means shares of Common Stock of the Company, [\_\_\_] par value per share.

1.6 “**Company Notice**” means written notice from the Company notifying the selling Key Holders and each Investor that the Company intends to exercise its Right of First Refusal as to some or all of the Transfer Stock with respect to any Proposed Key Holder Transfer.

1.7 [“**DPA**” means Section 721 of the Defense Production Act, as amended, including all implementing regulations thereof.]<sup>4</sup>

1.8 [“**DPA Triggering Rights**” means (i) “control” (as defined in the DPA); (ii) access to any “material non-public technical information” (as defined in the DPA) in the possession of the Company; (iii) membership or observer rights on the Board of Directors or

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<sup>4</sup> To be included if needed for any of the CFIUS-related provisions below.

equivalent governing body of the Company or the right to nominate an individual to a position on the Board of Directors or equivalent governing body of the Company; (iv) any involvement, other than through the voting of shares, in substantive decision-making of the Company regarding (x) the use, development, acquisition or release of any Company “critical technology” (as defined in the DPA); (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA).]<sup>5</sup>

1.9 [“**Foreign Person**” means either (i) a Person or government that is a “foreign person” within the meaning of the DPA or (ii) a Person through whose investment a “foreign person” within the meaning of the DPA would obtain any DPA Triggering Rights.]<sup>6</sup>

1.10 “**Investor Notice**” means written notice from any Investor notifying the Company and the selling Key Holder(s) that such Investor intends to exercise its Secondary Refusal Right as to a portion of the Transfer Stock with respect to any Proposed Key Holder Transfer.

1.11 “**Investors**” means the persons named on Schedule A hereto, each person to whom the rights of an Investor are assigned pursuant to Section 6.9, each person who hereafter becomes a signatory to this Agreement pursuant to Section 6.11 and any one of them, as the context may require[; provided, however, that any such person shall cease to be considered an Investor for purposes of this Agreement at any time such person and his, her or its Affiliates collectively hold fewer than [\_\_\_\_\_] shares of Capital Stock (as adjusted for any stock combination, stock split, stock dividend, recapitalization or other similar transaction)<sup>7</sup>].

1.12 “**Key Holders**” means the persons named on Schedule B hereto, each person to whom the rights of a Key Holder are assigned pursuant to Section 3.1, each person who hereafter becomes a signatory to this Agreement pursuant to Section 6.9 or 6.17 and any one of them, as the context may require.

1.13 “**Preferred Stock**” means collectively, all shares of Series A Preferred Stock [and Series [ ] Preferred Stock].<sup>8</sup>

1.14 “**Proposed Key Holder Transfer**” means any assignment, sale, offer to sell, pledge, mortgage, hypothecation, encumbrance, disposition of or any other like transfer or encumbering of any Transfer Stock (or any interest therein) proposed by any of the Key Holders.

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<sup>5</sup> To be included if needed for any of the CFIUS-related provisions below.

<sup>6</sup> To be included if needed for any of the CFIUS-related provisions below.

<sup>7</sup> This minimum shareholding requirement is sometimes expressed in terms of a certain percentage of the Company’s fully-diluted capitalization, in which case the Investor runs the risk of losing rights under this agreement if it fails to participate in future issuances.

<sup>8</sup> This definition may not be necessary in a Series A Financing. If it is not included, all references to Preferred Stock should be changed to Series A Preferred Stock.

1.15 “**Proposed Transfer Notice**” means written notice from a Key Holder setting forth the terms and conditions of a Proposed Key Holder Transfer.

1.16 “**Prospective Transferee**” means any person to whom a Key Holder proposes to make a Proposed Key Holder Transfer.

1.17 “**Restated Certificate**” means the Company’s Amended and Restated Certificate of Incorporation, as amended and/or restated from time to time.

1.18 “**Right of Co-Sale**” means the right, but not an obligation, of an Investor to participate in a Proposed Key Holder Transfer on the terms and conditions specified in the Proposed Transfer Notice.

1.19 “**Right of First Refusal**” means the right, but not an obligation, of the Company, or its permitted transferees or assigns, to purchase some or all of the Transfer Stock with respect to a Proposed Key Holder Transfer, on the terms and conditions specified in the Proposed Transfer Notice.

1.20 “**Secondary Notice**” means written notice from the Company notifying the Investors and the selling Key Holder that the Company does not intend to exercise its Right of First Refusal as to all shares of any Transfer Stock with respect to a Proposed Key Holder Transfer, on the terms and conditions specified in the Proposed Transfer Notice.

1.21 “**Secondary Refusal Right**” means the right, but not an obligation, of each Investor to purchase up to its pro rata portion (based upon the total number of shares of Capital Stock then held by all Investors) of any Transfer Stock not purchased pursuant to the Right of First Refusal, on the terms and conditions specified in the Proposed Transfer Notice.

1.22 “**Transfer Stock**” means shares of Capital Stock owned by a Key Holder, or issued to a Key Holder after the date hereof (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like), but does not include any shares of Preferred Stock or of Common Stock that are issued or issuable upon conversion of Preferred Stock.<sup>9</sup>

1.23 “**Undersubscription Notice**” means written notice from an Investor notifying the Company and the selling Key Holder that such Investor intends to exercise its option to purchase all or any portion of the Transfer Stock not purchased pursuant to the Right of First Refusal or the Secondary Refusal Right.

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<sup>9</sup> This definition should be modified appropriately if transfers by holders other than Key Holders will be subject to rights of first refusal and co-sale. See footnote 11. Also note that this definition permits sales by Key Holders of any Preferred Stock owned by Key Holders and any Common Stock received upon conversion of any Preferred Stock owned by Key Holders, on the theory that those shares have been purchased and should be treated the same as shares of Investor Preferred Stock.

2. Agreement Among the Company, the Investors and the Key Holders.

2.1 Right of First Refusal.<sup>10</sup>

(a) Grant. Subject to the terms of Section 3 below, each Key Holder<sup>11</sup> hereby unconditionally and irrevocably grants to the Company a Right of First Refusal to purchase all or any portion of Transfer Stock that such Key Holder may propose to transfer in a Proposed Key Holder Transfer, at the same price and on the same terms and conditions as those offered to the Prospective Transferee.

(b) Notice. Each Key Holder proposing to make a Proposed Key Holder Transfer must deliver a Proposed Transfer Notice to the Company and each Investor not later than [forty-five (45)] days prior to the consummation of such Proposed Key Holder Transfer. Such Proposed Transfer Notice shall contain the material terms and conditions (including price and form of consideration) of the Proposed Key Holder Transfer, the identity of the Prospective Transferee and the intended date of the Proposed Key Holder Transfer. To exercise its Right of First Refusal under this Section 2, the Company must deliver a Company Notice to the selling Key Holder and the Investors within fifteen (15) days after delivery of the Proposed Transfer Notice specifying the number of shares of Transfer Stock to be purchased by the Company. [In the event of a conflict between this Agreement and any other agreement that may have been entered into by a Key Holder with the Company that contains a preexisting right of first refusal, the Company and the Key Holder acknowledge and agree that the terms of this Agreement shall control and the preexisting right of first refusal shall be deemed satisfied by compliance with Section 2.1(a) and this Section 2.1(b).] [In the event of a conflict between this Agreement and the Company's Bylaws containing a preexisting right of first refusal, the terms of the Bylaws will control and compliance with the Bylaws shall be deemed compliance with this Section 2.1(a) and (b) in full.]

(c) Grant of Secondary Refusal Right to the Investors. Subject to the terms of Section 3 below, each Key Holder hereby unconditionally and irrevocably grants to the Investors a Secondary Refusal Right to purchase all or any portion of the Transfer Stock not purchased by the Company pursuant to the Right of First Refusal, as provided in this Section

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<sup>10</sup> Note the Delaware Court of Chancery's holding in *Latesco, L.P. v. Wayport, Inc.*, Case No. C.A. 4167-VCL (Del. Ch. Ct. July 24, 2009), that fiduciary disclosure principles do not apply to purchases by insiders pursuant to contractual ROFR provisions. The court essentially ruled that, under Delaware law, companies (as well as their officers and directors), are not required to disclose material non-public information to a seller before buying shares pursuant to ROFR provisions unless (1) the ROFR agreement expressly requires such disclosure; or (2) the Company or the insiders purchasing the shares make statements to the seller that are misleading absent additional disclosure. The court's decision does not necessarily imply a similar result under the federal securities laws.

<sup>11</sup> This form assumes that only transfers by Key Holders will be subject to rights of first refusal and co-sale. In certain circumstances, the Company or other Investors may request that the Investors also be subject to the same limitations on transfer as the Key Holders. Some Investors may feel that imposing ROFR/co-sale obligations on other Investors is necessary to protect the Preferred Stock liquidation preference against acquisitions structured as a tender offer – because that would not ordinarily trigger application of the liquidation preference in the Company's Certificate of Incorporation (but note that co-sale provisions would ordinarily provide the Investors with the same purchase price paid to the holders of Common Stock, rather than a higher price reflecting the liquidation preferences of the Preferred Stock; for further discussion of this point, see footnote 21 in the Voting Agreement). In other cases, Investors may wish to impose such restrictions on one another as means to police the composition of the Company's stockholders, or to ensure that they have “first dibs” if and when other Investors sell their shares.

2.1(c). If the Company does not provide the Company Notice exercising its Right of First Refusal with respect to all Transfer Stock subject to a Proposed Key Holder Transfer, the Company must deliver a Secondary Notice to the selling Key Holder and to each Investor to that effect no later than fifteen (15) days after the selling Key Holder delivers the Proposed Transfer Notice to the Company. To exercise its Secondary Refusal Right, an Investor must deliver an Investor Notice to the selling Key Holder and the Company within ten (10) days after the Company's deadline for its delivery of the Secondary Notice as provided in the preceding sentence.

(d) Undersubscription of Transfer Stock. If options to purchase have been exercised by the Company and the Investors pursuant to Sections 2.1(b) and (c) with respect to some but not all of the Transfer Stock by the end of the ten (10) day period specified in the last sentence of Section 2.1(c) (the "**Investor Notice Period**"), then the Company shall, within five (5) days after the expiration of the Investor Notice Period, send written notice (the "**Company Undersubscription Notice**") to those Investors who fully exercised their Secondary Refusal Right within the Investor Notice Period (the "**Exercising Investors**"). Each Exercising Investor shall, subject to the provisions of this Section 2.1(d), have an additional option to purchase all or any part of the balance of any such remaining unsubscribed shares of Transfer Stock on the terms and conditions set forth in the Proposed Transfer Notice. To exercise such option, an Exercising Investor must deliver an Undersubscription Notice to the selling Key Holder and the Company within ten (10) days after the expiration of the Investor Notice Period. In the event there are two (2) or more such Exercising Investors that choose to exercise the last-mentioned option for a total number of remaining shares in excess of the number available, the remaining shares available for purchase under this Section 2.1(d) shall be allocated to such Exercising Investors pro rata based on the number of shares of Transfer Stock such Exercising Investors have elected to purchase pursuant to the Secondary Refusal Right (without giving effect to any shares of Transfer Stock that any such Exercising Investor has elected to purchase pursuant to the Company Undersubscription Notice). If the options to purchase the remaining shares are exercised in full by the Exercising Investors, the Company shall immediately notify all of the Exercising Investors and the selling Key Holder of that fact.

(e) [Forfeiture of Rights]. Notwithstanding the foregoing, if the total number of shares of Transfer Stock that the Company and the Investors have agreed to purchase in the Company Notice, Investor Notices and Undersubscription Notices is less than the total number of shares of Transfer Stock, then the Company and the Investors shall be deemed to have forfeited any right to purchase such Transfer Stock, and the selling Key Holder shall be free to sell all, but not less than all, of the Transfer Stock to the Prospective Transferee on terms and conditions substantially similar to (and in no event more favorable than) the terms and conditions set forth in the Proposed Transfer Notice, it being understood and agreed that (i) any such sale or transfer shall be subject to the other terms and restrictions of this Agreement, including, without limitation, the terms and restrictions set forth in Sections 2.2 and 6.9(b); (ii) any future Proposed Key Holder Transfer shall remain subject to the terms and conditions of this Agreement, including this Section 2; and (iii) such sale shall be consummated within forty-five (45) days after receipt of the Proposed Transfer Notice by the Company and, if such sale is not consummated within such forty-

five (45) day period, such sale shall again become subject to the Right of First Refusal and Secondary Refusal Right on the terms set forth herein.]<sup>12</sup>

(f) Consideration; Closing. If the consideration proposed to be paid for the Transfer Stock is in property, services or other non-cash consideration, the fair market value of the consideration shall be as determined in good faith by the Board of Directors and as set forth in the Company Notice. If the Company or any Investor cannot for any reason pay for the Transfer Stock in the same form of non-cash consideration, the Company or such Investor may pay the cash value equivalent thereof, as determined in good faith by the Board of Directors and as set forth in the Company Notice. The closing of the purchase of Transfer Stock by the Company and the Investors shall take place, and all payments from the Company and the Investors shall have been delivered to the selling Key Holder, by the later of (i) the date specified in the Proposed Transfer Notice as the intended date of the Proposed Key Holder Transfer; and (ii) [forty-five (45)] days after delivery of the Proposed Transfer Notice.

## 2.2 Right of Co-Sale.

(a) Exercise of Right. If any Transfer Stock subject to a Proposed Key Holder Transfer is not purchased pursuant to Section 2.1 above and thereafter is to be sold to a Prospective Transferee, each respective Investor may elect to exercise its Right of Co-Sale and participate on a pro rata basis in the Proposed Key Holder Transfer as set forth in Section 2.2(b) below and, subject to Section 2.2(d), otherwise on the same terms and conditions specified in the Proposed Transfer Notice. Each Investor who desires to exercise its Right of Co-Sale (each, a **“Participating Investor”**) must give the selling Key Holder written notice to that effect within fifteen (15) days after the deadline for delivery of the Secondary Notice described above, and upon giving such notice such Participating Investor shall be deemed to have effectively exercised the Right of Co-Sale.

(b) Shares Includable. Each Participating Investor may include in the Proposed Key Holder Transfer all or any part of such Participating Investor’s Capital Stock equal to the product obtained by multiplying (i) the aggregate number of shares of Transfer Stock subject to the Proposed Key Holder Transfer (excluding shares purchased by the Company or the Participating Investors pursuant to the Right of First Refusal or the Secondary Refusal Right) by (ii) a fraction, the numerator of which is the number of shares of Capital Stock owned by such Participating Investor immediately before consummation of the Proposed Key Holder Transfer [(including any shares that such Participating Investor has agreed to purchase pursuant to the Secondary Refusal Right)] and the denominator of which is the total number of shares of Capital Stock owned, in the aggregate, by all Participating Investors immediately prior to the consummation of the Proposed Key Holder Transfer [(including any shares that all Participating

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<sup>12</sup> The “all or nothing” concept contained in this paragraph makes the right of first refusal provisions less onerous for the Key Holder, in that the Company and the Investors cannot simply chip away at the deal he or she has struck with the Prospective Transferee; they must either purchase all of the Transfer Stock or let the sale to the Prospective Transferee proceed undisturbed, subject to the Right of Co-Sale. This paragraph would be particularly valuable to a Key Holder that had a controlling interest in the Company and was only able to attract a purchaser by offering to sell that interest to one (1) party (who would not be interested in purchasing a smaller interest). If this paragraph is included, it is probably a good idea to include the preceding paragraph regarding undersubscriptions so that one (1) Investor cannot cause everyone to lose their right of first refusal by refusing to purchase its pro rata share.

Investors have collectively agreed to purchase pursuant to the Secondary Refusal Right)], plus the number of shares of Transfer Stock held by the [selling Key Holder][Key Holders]. [To the extent one (1) or more of the Participating Investors exercise such right of participation in accordance with the terms and conditions set forth herein, the number of shares of Transfer Stock that the selling Key Holder may sell in the Proposed Key Holder Transfer shall be correspondingly reduced.]

(c) Purchase and Sale Agreement. The Participating Investors and the selling Key Holder agree that the terms and conditions of any Proposed Key Holder Transfer in accordance with this Section 2.2 will be memorialized in, and governed by, a written purchase and sale agreement with the Prospective Transferee (the “**Purchase and Sale Agreement**”) with customary terms and provisions for such a transaction, and the Participating Investors and the selling Key Holder further covenant and agree to enter into such Purchase and Sale Agreement as a condition precedent to any sale or other transfer in accordance with this Section 2.2.

(d) Allocation of Consideration.

(i) Subject to Section 2.2(d)(ii), the aggregate consideration payable to the Participating Investors and the selling Key Holder shall be allocated based on the number of shares of Capital Stock sold to the Prospective Transferee by each Participating Investor and the selling Key Holder as provided in Section 2.2(b), provided that if a Participating Investor wishes to sell Preferred Stock, the price set forth in the Proposed Transfer Notice shall be appropriately adjusted based on the conversion ratio of the Preferred Stock into Common Stock.

(ii) In the event that the Proposed Key Holder Transfer constitutes a Change of Control, the terms of the Purchase and Sale Agreement shall provide that the aggregate consideration from such transfer shall be allocated to the Participating Investors and the selling Key Holder in accordance with Sections 2.1 and 2.2 of Article IV(B) of the Restated Certificate [and, if applicable, the next sentence] as if (A) such transfer were a Deemed Liquidation Event (as defined in the Restated Certificate), and (B) the Capital Stock sold in accordance with the Purchase and Sale Agreement were the only Capital Stock outstanding.<sup>13</sup> [In the event that a portion of the aggregate consideration payable to the Participating Investor(s) and selling Key Holder is placed into escrow and/or is payable only upon satisfaction of contingencies, the Purchase and Sale Agreement shall provide that (x) the portion of such consideration that is not placed in escrow and is not subject to contingencies (the “**Initial Consideration**”) shall be allocated in accordance with Sections 2.1 and 2.2 of Article IV(B) of the Restated Certificate as if the Initial Consideration were the only consideration payable in connection with such transfer, and (y) any additional consideration which becomes payable to the Participating Investor(s) and selling Key Holder upon release from escrow or satisfaction of such contingencies shall be allocated in

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<sup>13</sup> This provision allows the investors to receive their liquidation preference in the event that the majority stockholders sell their shares directly to a third party.

accordance with Sections 2.1 and 2.2 of Article IV(B) of the Restated Certificate after taking into account the previous payment of the Initial Consideration as part of the same transfer.]<sup>14</sup>

(e) Purchase by Selling Key Holder; Deliveries. Notwithstanding Section 2.2(c) above, if any Prospective Transferee(s) refuse(s) to purchase securities subject to the Right of Co-Sale from any Participating Investor or Investors or upon the failure to negotiate [in good faith] a Purchase and Sale Agreement [reasonably] satisfactory to the Participating Investors, no Key Holder may sell any Transfer Stock to such Prospective Transferee(s) unless and until, simultaneously with such sale, such Key Holder purchases all securities subject to the Right of Co-Sale from such Participating Investor or Investors on the same terms and conditions (including the proposed purchase price) as set forth in the Proposed Transfer Notice and as provided in Section 2.2(d)(i); provided, however, if such sale constitutes a Change of Control, the portion of the aggregate consideration paid by the selling Key Holder to such Participating Investor or Investors shall be made in accordance with the first sentence of Section 2.2(d)(ii). In connection with such purchase by the selling Key Holder, such Participating Investor or Investors shall deliver to the selling Key Holder any stock certificate or certificates, properly endorsed for transfer, representing the Capital Stock being purchased by the selling Key Holder (or request that the Company effect such transfer in the name of the selling Key Holder). Any such shares transferred to the selling Key Holder will be transferred to the Prospective Transferee against payment therefor in consummation of the sale of the Transfer Stock pursuant to the terms and conditions specified in the Proposed Transfer Notice, and the selling Key Holder shall concurrently therewith remit or direct payment to each such Participating Investor the portion of the aggregate consideration to which each such Participating Investor is entitled by reason of its participation in such sale as provided in this Section 2.2(e).

(f) Additional Compliance. If any Proposed Key Holder Transfer is not consummated within [forty-five (45)]<sup>15</sup> days after receipt of the Proposed Transfer Notice by the Company, the Key Holders proposing the Proposed Key Holder Transfer may not sell any Transfer Stock unless they first comply in full with each provision of this Section 2. The exercise or election not to exercise any right by any Investor hereunder shall not adversely affect its right to participate in any other sales of Transfer Stock subject to this Section 2.2.

### 2.3 Effect of Failure to Comply.

(a) Transfer Void; Equitable Relief. Any Proposed Key Holder Transfer not made in compliance with the requirements of this Agreement shall be null and void ab initio, shall not be recorded on the books of the Company or its transfer agent and shall not be recognized by the Company. Each party hereto acknowledges and agrees that any breach of this Agreement would result in substantial harm to the other parties hereto for which monetary damages alone could not adequately compensate. Therefore, the parties hereto unconditionally and irrevocably agree that any non-breaching party hereto shall be entitled to seek protective orders, injunctive relief and other remedies available at law or in equity (including, without

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<sup>14</sup> Use the bracketed language if you use Section 2.3.4 (Allocation of Escrow) from the Model Certificate of Incorporation.

<sup>15</sup> Logistical considerations may make a sixty (60) day period more reasonable.

limitation, seeking specific performance or the rescission of purchases, sales and other transfers of Transfer Stock not made in strict compliance with this Agreement).

(b) Violation of First Refusal Right. If any Key Holder becomes obligated to sell any Transfer Stock to the Company or any Investor under this Agreement and fails to deliver such Transfer Stock in accordance with the terms of this Agreement, the Company and/or such Investor may, at its option, in addition to all other remedies it may have, send to such Key Holder the purchase price for such Transfer Stock as is herein specified and transfer to the name of the Company or such Investor (or request that the Company effect such transfer in the name of an Investor) on the Company's books any certificates, instruments, or book entry representing the Transfer Stock to be sold.

(c) Violation of Co-Sale Right. If any Key Holder purports to sell any Transfer Stock in contravention of the Right of Co-Sale (a "**Prohibited Transfer**"), each Participating Investor who desires to exercise its Right of Co-Sale under Section 2.2 may, in addition to such remedies as may be available by law, in equity or hereunder, require such Key Holder to purchase from such Participating Investor the type and number of shares of Capital Stock that such Participating Investor would have been entitled to sell to the Prospective Transferee had the Prohibited Transfer been effected in compliance with the terms of Section 2.2. The sale will be made on the same terms, including, without limitation, as provided in Section 2.2(d)(i) and the first sentence of Section 2.2(d)(ii), as applicable, and subject to the same conditions as would have applied had the Key Holder not made the Prohibited Transfer, except that the sale (including, without limitation, the delivery of the purchase price) must be made within ninety (90) days after the Participating Investor learns of the Prohibited Transfer, as opposed to the timeframe proscribed in Section 2.2. Such Key Holder shall also reimburse each Participating Investor for any and all reasonable and documented out-of-pocket fees and expenses, including reasonable legal fees and expenses, incurred pursuant to the exercise or the attempted exercise of the Participating Investor's rights under Section 2.2.

2.4 [Limitation on Foreign Person Investors. Notwithstanding the covenants set forth in this Section 2, no Investor that is a Foreign Person shall be permitted to obtain greater than nine and nine-tenths percent (9.9%) of the outstanding voting shares of the Company.]<sup>16</sup>

### 3. Exempt Transfers.<sup>17</sup>

3.1 Exempted Transfers. Notwithstanding the foregoing or anything to the contrary herein, the provisions of Sections 2.1 and 2.2 shall not apply (a) in the case of a Key Holder that is an entity, upon a transfer by such Key Holder to its stockholders, members, partners or other equity holders, (b) to a repurchase of Transfer Stock from a Key Holder by the Company

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<sup>16</sup> Inclusion of this limitation is appropriate in cases in which there is a foreign person investing into the Company but that investor intends to avoid obtaining any rights that might trigger CFIUS intervention. In such cases, depending on the nature of the U.S. business, the foreign investor may need to avoid obtaining "control," and in order to do so may need to stay below the CFIUS-designated passivity threshold of ten percent (10%) of outstanding voting shares.

<sup>17</sup> Often the definition of a "Permitted Transfer" is negotiated on a case-by-case basis. For example, a Key Holder may wish to be permitted to Transfer a *de minimis* amount of Shares to a third party, such as a charity. However, the examples set forth herein are fairly standard and found in many Co-Sale Agreements.

at a price no greater than that originally paid by such Key Holder for such Transfer Stock and pursuant to an agreement containing vesting and/or repurchase provisions approved by a majority of the Board of Directors, [(c) to a pledge of Transfer Stock that creates a mere security interest in the pledged Transfer Stock, provided that the pledgee thereof agrees in writing in advance to be bound by and comply with all applicable provisions of this Agreement to the same extent as if it were the Key Holder making such pledge,] [or] (d) in the case of a Key Holder that is a natural person, upon a transfer of Transfer Stock by such Key Holder made for bona fide estate planning purposes, either during his or her lifetime or on death by will or intestacy to his or her spouse, including any life partner or similar statutorily-recognized domestic partner, child (natural or adopted), or any other direct lineal descendant of such Key Holder (or his or her spouse, including any life partner or similar statutorily-recognized domestic partner) (all of the foregoing collectively referred to as “family members”), or any other [relative/person] approved by [unanimous consent of] the Board of Directors, or any custodian or trustee of any trust, partnership or limited liability company for the benefit of, or the ownership interests of which are owned wholly by such Key Holder or any such family members; [or (e) to the sale by the Key Holder of up to [\_\_%] of the Transfer Stock held by such Key Holder as of the date that such Key Holder first became party to this Agreement]; provided that in the case of clause(s) [(a)], [(c)], [(d)] or [(e)], the Key Holder shall deliver prior written notice to the Investors of such pledge, gift or transfer and such shares of Transfer Stock shall at all times remain subject to the terms and restrictions set forth in this Agreement and such transferee shall, as a condition to such Transfer, deliver a counterpart signature page to this Agreement as confirmation that such transferee shall be bound by all the terms and conditions of this Agreement as a Key Holder (but only with respect to the securities so transferred to the transferee), including the obligations of a Key Holder with respect to Proposed Key Holder Transfers of such Transfer Stock pursuant to Section 2]; and provided further in the case of any transfer pursuant to clause (a) or (d) above, that such transfer is made pursuant to a transaction in which there is no consideration actually paid for such transfer].

3.2 Exempted Offerings. Notwithstanding the foregoing or anything to the contrary herein, the provisions of Section 2 shall not apply to the sale of any Transfer Stock (a) to the public in an offering pursuant to an effective registration statement under the Securities Act of 1933, as amended (a “**Public Offering**”); or (b) pursuant to a Deemed Liquidation Event (as defined in the Restated Certificate).

3.3 [Prohibited Transferees. Notwithstanding the foregoing, no Key Holder shall transfer any Transfer Stock to (a) any entity which, in the determination of the Board of Directors, directly or indirectly competes with the Company; (b) any customer, distributor or supplier of the Company, if the Board of Directors should determine that such transfer would result in such customer, distributor or supplier receiving information that would place the Company at a competitive disadvantage with respect to such customer, distributor or supplier; or (c) any Foreign Person that pursuant to any such transfer would acquire any DPA Triggering Rights, unless otherwise approved by the Board of Directors.]

4. Legend. Each certificate, instrument, or book entry representing shares of Transfer Stock held by the Key Holders or issued to any permitted transferee in connection with a transfer permitted by Section 3.1 hereof shall be notated with the following legend:

THE SALE, PLEDGE, HYPOTHECATION, OR TRANSFER OF THE SECURITIES REPRESENTED HEREBY IS SUBJECT TO, AND IN CERTAIN CASES PROHIBITED BY, THE TERMS AND CONDITIONS OF A CERTAIN RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT BY AND AMONG THE STOCKHOLDER, THE CORPORATION AND CERTAIN OTHER HOLDERS OF STOCK OF THE CORPORATION. COPIES OF SUCH AGREEMENT MAY BE OBTAINED UPON WRITTEN REQUEST TO THE SECRETARY OF THE CORPORATION.

Each Key Holder agrees that the Company may instruct its transfer agent to impose transfer restrictions on the shares notated with the legend referred to in this Section 4 above to enforce the provisions of this Agreement, and the Company agrees to promptly do so. The legend shall be removed upon termination of this Agreement at the request of the holder.

5. Lock-Up.

5.1 Agreement to Lock-Up. Each Key Holder hereby agrees that it will not, without the prior written consent of the managing underwriter, during the period commencing on the date of the final prospectus relating to the Company's initial public offering (the "IPO") and ending on the date specified by the Company and the managing underwriter [(such period not to exceed one hundred eighty (180) days)], or such other period as may be requested by the Company or an underwriter to accommodate regulatory restrictions on (1) the publication or other distribution of research reports; and (2) analyst recommendations and opinions, including, but not limited to, the restrictions contained in applicable FINRA rules, or any successor provisions or amendments thereto,]<sup>18</sup> (a) lend, offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, or otherwise transfer or dispose of, directly or indirectly, any shares of Capital Stock held immediately prior to the effectiveness of the registration statement for the IPO; or (b) enter into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of the Capital Stock, whether any such transaction described in clause (a) or (b) above is to be settled by delivery of Capital Stock or other securities, in cash or otherwise. The foregoing provisions of this Section 5 shall not apply to the sale of any shares to an underwriter pursuant to an underwriting agreement [or to the establishment of a trading plan pursuant to Rule 10b5-1, provided that such plan does not permit transfers during the restricted period], and shall only be applicable to the Key Holders if all officers, directors and holders of more than one percent (1%) of the outstanding Common Stock (after giving effect to the conversion into Common Stock of all outstanding [Series A] Preferred Stock) enter into similar agreements. The underwriters in connection with the IPO are intended third-party beneficiaries of this Section 5 and shall have the right, power and authority to enforce the provisions hereof as

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<sup>18</sup> The bracketed language is intended to address FINRA rules designed to limit conflicts of interest between the research and investment banking divisions of financial institutions by prohibiting the publication or other distribution of a research report or the making of a public appearance concerning a subject Company by a member during a "quiet period" prior to and after the expiration, waiver or termination of a lock-up agreement or any other agreement that the member has entered into with a subject company or its shareholders that restricts or prohibits the sale of securities held by the subject company or its shareholders after the completion of a securities offering, unless the securities are "actively traded" within the meaning of Rule 101(c)(1) of Regulation M under the Exchange Act.

though they were a party hereto. Each Key Holder further agrees to execute such agreements as may be reasonably requested by the underwriters in the IPO that are consistent with this Section 5 or that are necessary to give further effect thereto.

5.2 Stop Transfer Instructions. In order to enforce the foregoing covenant, the Company may impose stop-transfer instructions with respect to the shares of Capital Stock of each Key Holder (and transferees and assignees thereof) until the end of such restricted period.

6. Miscellaneous.

6.1 Term. This Agreement shall automatically terminate upon the earlier of (a) immediately prior to the consummation of the Company's IPO; and (b) the consummation of a Deemed Liquidation Event (as defined in the Restated Certificate).

6.2 Stock Split. All references to numbers of shares in this Agreement shall be appropriately adjusted to reflect any stock dividend, split, combination or other recapitalization affecting the Capital Stock occurring after the date of this Agreement.

6.3 Ownership. Each Key Holder represents and warrants that such Key Holder is the sole legal and beneficial owner of the shares of Transfer Stock subject to this Agreement and that no other person or entity has any interest in such shares (other than a community property interest as to which the holder thereof has acknowledged and agreed in writing to the restrictions and obligations hereunder).

6.4 Dispute Resolution. The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [state] and to the jurisdiction of the United States District Court for the District of [judicial district] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [state] or the United States District Court for the District of [judicial district], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

**WAIVER OF JURY TRIAL: EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS, THE SECURITIES OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT**

BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

[*Alternative*<sup>19</sup>: Any unresolved controversy or claim arising out of or relating to this Agreement, except as (i) otherwise provided in this Agreement, or (ii) any such controversies or claims arising out of either party's intellectual property rights for which a provisional remedy or equitable relief is sought, shall be submitted to arbitration by one (1) arbitrator mutually agreed upon by the parties, and if no agreement can be reached within thirty (30) days after names of potential arbitrators have been proposed by the American Arbitration Association (the "AAA"), then by one (1) arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by the AAA. The arbitration shall take place in [location], in accordance with the AAA rules then in effect, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof. There shall be limited discovery prior to the arbitration hearing as follows: (a) exchange of witness lists and copies of documentary evidence and documents relating to or arising out of the issues to be arbitrated, (b) depositions of all party witnesses and (c) such other depositions as may be allowed by the arbitrators upon a showing of good cause. Depositions shall be conducted in accordance with the [state] Code of Civil Procedure, the arbitrator shall be required to provide in writing to the parties the basis for the award or order of such arbitrator, and a court reporter shall record all hearings, with such record constituting the official transcript of such proceedings.

[Each party will bear its own costs in respect of any disputes arising under this Agreement.] [The prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.] Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [state] having subject matter jurisdiction.]

[*Alternative 2*:<sup>20</sup>

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a

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<sup>19</sup> Some lawyers prefer to include a binding arbitration provision as the sole means of dispute resolution on the theory that arbitration is confidential and may be less expensive and more efficient. Some investors, however, dislike arbitration because the result cannot be appealed, and the arbitrator(s) is not bound to follow case law and precedent.

<sup>20</sup> This arbitration provision is offered as an alternative to the AAA provision for parties that would prefer to resolve disputes under the Delaware Rapid Arbitration Act. The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the Act provides for a truncated "summary" proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate. By statute, this proceeding must be concluded no more than thirty (30) days after its initial filing is served, and the jurisdiction of the Court is highly limited. Second, the Act divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the Act vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is "substantive" or "procedural" does

“**Dispute**”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 Del. C § 5801, et seq. (the “**DRAA**”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “**Arbitration**”) in accordance with this Section 6.4, and each party represents and warrants that it is not a “consumer” as such term is defined in 6 Del. C. § 2731. By executing this Agreement, (i) each party waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in Sections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party agrees that it will raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 6.4 and understands that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.<sup>21</sup> To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.<sup>22</sup>

(d) The Arbitration shall be presided over by one (1) arbitrator (the “**Arbitrator**”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “**Replacement Arbitrator**”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or

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not apply to arbitrations under the Act, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court. Third, the Act vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed, thus avoiding the need for parallel proceedings to compel or enjoin arbitration. Finally, the Act provides that, absent an agreement otherwise, all matters must be finally determined within one hundred twenty (120) days of the arbitrator’s acceptance of appointment (which deadline may be extended to one hundred eighty (180) days, but no longer, by unanimous consent of the parties). Furthermore, the Act imposes a financial penalty on an arbitrator who does not decide the matter within the allotted timeframe: the forfeiture of the arbitrator’s fees. The Act makes challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The Act also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

<sup>21</sup> The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this Section (c).

<sup>22</sup> The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware.

the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.<sup>23</sup>

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.<sup>24</sup>

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.<sup>25</sup>

(g) The arbitral award (the “**Award**”) shall (i) be rendered within [one hundred twenty (120)] days after the Arbitrator’s acceptance of his or her appointment;<sup>26</sup> (ii) be delivered in writing; (iii) state the reasons for the Award;<sup>27</sup> (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;<sup>28</sup> and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section 6.4 shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief;

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<sup>23</sup> The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

<sup>24</sup> The DRAA empowers the parties to include one, both or neither of the provisions set forth in Section (f). If the parties wish to proceed without discovery, neither of the sentences in Section (f) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The Act would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The Act contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

<sup>25</sup> The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration.

<sup>26</sup> The parties may specify a longer period for the arbitration. If they do not do so, the one hundred twenty (120) day period of the DRAA is the default, and such period may be extended by no more than an additional sixty (60) days, and then only upon consent of all parties to the arbitration.

<sup>27</sup> A reasoned award is not required by the Act, but may be required by the parties’ contract.

<sup>28</sup> The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Section (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator’s award, in which case clause (iv) of Section (f) should not be included.

provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.<sup>29</sup>

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,<sup>30</sup> and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, [any third-party discovery proceedings, including any discovery obtained pursuant thereto,]<sup>31</sup> and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.<sup>32</sup> In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half (1/2) of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.<sup>33</sup>

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “**Respondent**”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the

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<sup>29</sup> Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

<sup>30</sup> This phrase would be included only in the event that one (1) or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

<sup>31</sup> Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in Section (f), above.

<sup>32</sup> Clause (v) would be excluded in the event that third-party discovery was not provided for in Section (f) above.

<sup>33</sup> The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

extent possible, sufficient information to such court to allow it to determine whether the doctrines of res judicata, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section 6.4, if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section 6.4 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 6.4 shall be enforced to the fullest extent permitted by law.

(l) [Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.<sup>34</sup>] [*Alternative A:*<sup>35</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>36</sup> The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.<sup>37</sup>] [*Alternative B:*<sup>38</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>39</sup> The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.]]

## 6.5 Notices.

(a) All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt or (a) personal delivery to the party to be notified, (b) when sent, if sent by electronic mail during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient's next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) business day after deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on Schedule A or Schedule B hereof, as the case may be, or to

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<sup>34</sup> The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of Section (f).

<sup>35</sup> The following is an alternative appellate provision in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA.

<sup>36</sup> In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one (1) or more senior Delaware lawyers.

<sup>37</sup> This provision contemplates a scope of challenge to the Arbitrator's final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

<sup>38</sup> The following is an alternative appellate provision for use in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.

<sup>39</sup> See footnote 36 above.

such email address or address as subsequently modified by written notice given in accordance with this Section 6.5. If notice is given to the Company, it shall be sent to [*Company Address, Attention: \_\_\_\_\_*]; and a copy (which copy shall not constitute notice) shall also be sent to [*Company Counsel Name and Address*]; and if notice is given to the Investors, a copy (which copy shall not constitute notice) shall also be given to [*Investor Counsel Name and Address*]<sup>40</sup>.

(b) Consent to Electronic Notice. Each Investor and Key Holder consents to the delivery of any stockholder notice pursuant to the Delaware General Corporation Law (the “DGCL”), as amended or superseded from time to time, by electronic transmission pursuant to Section 232 of the DGCL (or any successor thereto) at the electronic mail address set forth below such Investor’s or Key Holder’s name on the Schedules hereto, as updated from time to time by notice to the Company, or as on the books of the Company. To the extent that any notice given by means of electronic transmission is returned or undeliverable for any reason, the foregoing consent shall be deemed to have been revoked until a new or corrected electronic mail address has been provided, and such attempted electronic notice shall be ineffective and deemed to not have been given. Each Investor and Key Holder agrees to promptly notify the Company of any change in its electronic mail address, and that failure to do so shall not affect the foregoing.

6.6 Entire Agreement. This Agreement (including, the Exhibits and Schedules hereto) [together with the other Transaction Documents (as defined in the Purchase Agreement)]<sup>41</sup> constitutes the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

6.7 Delays or Omissions. No delay or omission to exercise any right, power or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power or remedy of such non-breaching or non-defaulting party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any party of any breach or default under this Agreement, or any waiver on the part of any party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

6.8 Amendment; Waiver and Termination. This Agreement may be amended, modified or terminated (other than pursuant to Section 6.1 above) and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a written instrument executed by (a) the Company, (b) the Key Holders holding [specify percentage] of the shares of Transfer Stock then held by all of the Key Holders [provided that such consent shall not be required if the Key Holders do not then own shares of

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<sup>40</sup> Consider moving the counsel cc address to the schedules for investors, since often more than one.

<sup>41</sup> It may be appropriate to include if there are side letters or other agreements that cover similar aspects.

Capital Stock representing at least [\_\_\_]% of the outstanding Capital Stock of the Company] [who are then providing services to the Company as officers, employees or consultants], and (c) the holders of [specify percentage] of the shares of Common Stock issued or issuable upon conversion of the then outstanding shares of Preferred Stock held by the Investors (voting as a single separate class and on an as-converted basis). Any amendment, modification, termination or waiver so effected shall be binding upon the Company, the Investors, the Key Holders and all of their respective successors and permitted assigns whether or not such party, assignee or other shareholder entered into or approved such amendment, modification, termination or waiver. [Notwithstanding the foregoing, (i) this Agreement may not be amended, modified or terminated and the observance of any term hereunder may not be waived with respect to any Investor or Key Holder without the written consent of such Investor or Key Holder unless such amendment, modification, termination or waiver applies to all Investors and Key Holders, respectively, in the same fashion, (ii) this Agreement may not be amended, modified or terminated and the observance of any term hereunder may not be waived with respect to any Investor without the written consent of such Investor, if such amendment, modification, termination or waiver would adversely affect the rights of such Investor in a manner disproportionate to any adverse effect such amendment, modification, termination or waiver would have on the rights of the other Investors under this Agreement, (iii) the consent of the Key Holders shall not be required for any amendment, modification, termination or waiver if such amendment, modification, termination or waiver does not apply to the Key Holders, and (iv) Schedule A hereto may be amended by the Company from time to time in accordance with the Purchase Agreement to add information regarding Additional Purchasers (as defined in the Purchase Agreement) without the consent of the other parties hereto.]<sup>42</sup> The Company shall give prompt written notice of any amendment, modification or termination hereof or waiver hereunder to any party hereto that did not consent in writing to such amendment, modification, termination or waiver. No waivers of or exceptions to any term, condition or provision of this Agreement, in any one (1) or more instances, shall be deemed to be, or construed as, a further or continuing waiver of any such term, condition or provision.

#### 6.9 Assignment of Rights.

(a) The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and permitted assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and permitted assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

(b) Any successor or permitted assignee of any Key Holder, including any Prospective Transferee who purchases shares of Transfer Stock in accordance with the terms hereof, shall deliver to the Company and the Investors, as a condition to any transfer or assignment, a counterpart signature page hereto pursuant to which such successor or permitted assignee shall confirm their agreement to be subject to and bound by all of the provisions set forth in this

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<sup>42</sup> There may be situations when a party is asked to waive or amend a right but not all similarly situated parties are required to do so. Consider a provision that indicates a party may waive or amend his own rights without having to obtain the consent of all of the others who are a part of his or her group.

Agreement that were applicable to the predecessor or assignor of such successor or permitted assignee.<sup>43</sup>

(c) The rights of the Investors hereunder are not assignable without the Company's written consent (which shall not be unreasonably withheld, delayed or conditioned), except (i) by an Investor to any Affiliate, or (ii) to an assignee or transferee who acquires at least [\_\_\_\_\_] shares of Capital Stock (as adjusted for any stock combination, stock split, stock dividend, recapitalization or other similar transaction), it being acknowledged and agreed that any such assignment, including an assignment contemplated by the preceding clauses (i) or (ii) shall be subject to and conditioned upon any such assignee's delivery to the Company and the other Investors of a counterpart signature page hereto pursuant to which such assignee shall confirm their agreement to be subject to and bound by all of the provisions set forth in this Agreement that were applicable to the assignor of such assignee.

(d) Except in connection with an assignment by the Company by operation of law to the acquirer of the Company, the rights and obligations of the Company hereunder may not be assigned under any circumstances.

6.10 Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision.

6.11 Additional Investors. Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of the Company's Series [\_\_\_] Preferred Stock after the date hereof, any purchaser of such shares of Series [\_\_\_] Preferred Stock may become a party to this Agreement by executing and delivering an additional counterpart signature page to this Agreement and thereafter shall be deemed an "Investor" for all purposes hereunder.

6.12 Governing Law.<sup>44</sup> This Agreement shall be governed by the internal law of the [State of Delaware],<sup>45</sup> without regard to conflict of law principles that would result in the application of any law other than the law of the [State of Delaware].

6.13 Titles and Subtitles. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

6.14 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*,

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<sup>43</sup> It can be a point of negotiation as to whether a Key Holder transferee should be required to take shares subject to the first refusal and co-sale restrictions of the agreement.

<sup>44</sup> After choosing the applicable law, the parties should determine whether such law imposes any particular requirements, such as special legends or other notices, in order to make restrictions on transfer of shares effective.

<sup>45</sup> Some practitioners may select Delaware law as it has historically been the richest source for corporation law precedent. Other practitioners will prefer to choose the (non-Delaware) jurisdiction in which they are admitted to practice, if for no other reason than not having to retain Delaware counsel in the event they are called upon to give an enforceability opinion.

www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

6.15 Aggregation of Stock. All shares of Capital Stock held or acquired by Affiliated entities or persons shall be aggregated together for the purpose of determining the availability of any rights under this Agreement and such Affiliated persons may apportion such rights as among themselves in any manner they deem appropriate.

6.16 Specific Performance. In addition to any and all other remedies that may be available at law in the event of any breach of this Agreement, each Investor shall be entitled to specific performance of the agreements and obligations of the Company and the Key Holders hereunder and to such other injunction or other equitable relief as may be granted by a court of competent jurisdiction.

6.17 [Additional Key Holders]. In the event that after the date of this Agreement, the Company issues shares of Common Stock, or options to purchase Common Stock, to any employee or consultant, which shares or options would collectively constitute with respect to such employee or consultant (taking into account all shares of Common Stock, options and other purchase rights held by such employee or consultant) one percent (1%) or more of the Company's then outstanding Common Stock (treating for this purpose all shares of Common Stock issuable upon exercise of or conversion of outstanding options, warrants or convertible securities, as if exercised or converted), the Company shall, as a condition to such issuance, cause such employee or consultant to execute a counterpart signature page hereto as a Key Holder, and such person shall thereby be bound by, and subject to, all the terms and provisions of this Agreement applicable to a Key Holder.]

6.18 [Effect on Prior Agreement]. Upon the effectiveness of this Agreement, the Prior Agreement shall be deemed amended and restated and superseded and replaced in its entirety by this Agreement, and shall be of no further force or effect.]<sup>46</sup>

[Signature Page Follows]

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<sup>46</sup> The drafter should ensure that the relevant signatories to the current agreement have authority to terminate the Prior Agreement under the terms of the Prior Agreement. Alternatively, if the Prior Agreement is terminated rather than amended and restated, "the Prior Agreement shall terminate and be of no further force and or effect and shall be superseded and replaced in its entirety by this Agreement."

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Right of First Refusal and Co-Sale Agreement as of the date first written above.

COMPANY:

*[Insert Company Name]*

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

KEY HOLDERS:

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

INVESTORS:<sup>47</sup>

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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<sup>47</sup> Insert customized signature blocks

**SCHEDULE A**

**INVESTORS**

**Name and Address**

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

**SCHEDULE B**

**KEY HOLDERS**

**Name and Address**

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.

### *Preliminary Note*

*An Investors' Rights Agreement can cover many different subjects. The most common are information rights, registration rights, contractual "rights of first offer" or "preemptive" rights (i.e., the right to purchase securities in subsequent equity financings conducted by the Company), and various post-closing covenants of the Company.*

## [AMENDED AND RESTATED] INVESTORS' RIGHTS AGREEMENT

THIS [AMENDED AND RESTATED] INVESTORS' RIGHTS AGREEMENT (this "**Agreement**"), is made as of [\_\_\_\_\_], 20[\_\_\_], by and among [\_\_\_\_\_], a [Delaware] corporation (the "**Company**"), [and] each of the investors listed on Schedule A hereto, each of which is referred to in this Agreement as an "**Investor**"[, and each of the stockholders listed on Schedule B hereto, each of whom is referred to herein as a "**Key Holder**"].

### RECITALS

[*Alternative 1:*<sup>1</sup>

**WHEREAS**, the Company and the Investors are parties to that certain Series A Preferred Stock Purchase Agreement of even date herewith (the "**Purchase Agreement**"); and

**WHEREAS**, in order to induce the Company to enter into the Purchase Agreement and to induce the Investors to invest funds in the Company pursuant to the Purchase Agreement, the Investors and the Company hereby agree that this Agreement shall govern the rights of the Investors to cause the Company to register shares of Common Stock issuable to the Investors, to receive certain information from the Company, and to participate in future equity offerings by the Company, and shall govern certain other matters as set forth in this Agreement;

**NOW, THEREFORE**, the parties hereby agree as follows:]

[*Alternative 2:*<sup>2</sup>

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<sup>1</sup> This first set of Recitals is appropriate when you are drafting legal documents in connection with the Company's sale of its first series of preferred stock (Series A). Consider adding references to Key Holders in the Recitals, as appropriate.

<sup>2</sup> This second set of Recitals assumes that a preexisting Investors' Rights Agreement is being superseded and replaced with a new version. It contemplates two different series of preferred stock (Series A and B). Appropriate modifications to this form will be required based on the actual series of preferred stock outstanding and the respective rights of such series. This Agreement contemplates the amendment and restatement of the Prior Agreement so that the parties to the existing agreement become parties to this Agreement regardless of whether they execute this Agreement; alternatively, the existing agreement could be terminated and all existing investors would be required to execute this Agreement. See also Section 6.10. Consider adding references to Key Holders in the Recitals, as appropriate.

**WHEREAS**, certain of the Investors (the “**Existing Investors**”) hold shares of [Series [\_\_]] Preferred Stock and/or shares of Common Stock issued upon conversion thereof and possess registration rights, information rights, rights of first offer, and other rights pursuant to that certain Investors’ Rights Agreement dated as of [\_\_\_\_\_, 20\_\_], by and among the Company and such Existing Investors (the “**Prior Agreement**”); and

**WHEREAS**, the Existing Investors are holders of at least [\_\_\_\_\_ percent (\_\_\_%)] of the Registrable Securities (as defined in the Prior Agreement), and desire to [amend and restate][terminate] the Prior Agreement in its entirety and to accept the rights created pursuant to this Agreement in lieu of the rights granted to them under the Prior Agreement; and

**WHEREAS**, certain of the Investors are parties to that certain Series [\_\_] Preferred Stock Purchase Agreement of even date herewith by and among the Company and such Investors (the “**Purchase Agreement**”), under which certain of the Company’s and such Investors’ obligations are conditioned upon the execution and delivery of this Agreement by such Investors, Existing Investors holding at least [\_\_\_\_\_ percent (\_\_\_%)] of the Registrable Securities, and the Company;

**NOW, THEREFORE**, the Existing Investors hereby agree that the Prior Agreement is hereby amended and restated in its entirety by this Agreement, and the parties to this Agreement further agree as follows:]

1. Definitions. For purposes of this Agreement:

1.1 “**Affiliate**” means, with respect to any specified Person, any other Person who, directly or indirectly, controls, is controlled by, or is under common control with such Person, including, without limitation, any general partner, managing member, officer, director or trustee of such Person, or any venture capital fund or other investment fund now or hereafter existing that is controlled by one (1) or more general partners, managing members or investment adviser of, or shares the same management company or investment adviser with, such Person.

1.2 “**Board of Directors**” means the board of directors of the Company.

1.3 “**Certificate of Incorporation**” means the Company’s Amended and Restated Certificate of Incorporation, as amended and/or restated from time to time.

1.4 “**Common Stock**” means shares of the Company’s common stock, par value [\$0.\_\_\_\_] per share.

1.5 [“**Competitor**” means a Person engaged, directly or indirectly (including through any partnership, limited liability company, corporation, joint venture or similar arrangement (whether now existing or formed hereafter)), in [*description of business*], but shall not include any financial investment firm or collective investment vehicle that, together with its Affiliates, holds less than [twenty percent (20)]% of the outstanding equity of any Competitor and does not, nor do

any of its Affiliates, have a right to designate any members of the board of directors of any Competitor.]<sup>3</sup>

1.6 “**Damages**” means any loss, damage, claim or liability (joint or several) to which a party hereto may become subject under the Securities Act, the Exchange Act, or other federal or state law, insofar as such loss, damage, claim or liability (or any action in respect thereof) arises out of or is based upon: (i) any untrue statement or alleged untrue statement of a material fact contained in any registration statement of the Company, including any preliminary prospectus or final prospectus contained therein or any amendments or supplements thereto; (ii) an omission or alleged omission to state therein a material fact required to be stated therein, or necessary to make the statements therein not misleading; or (iii) any violation or alleged violation by the indemnifying party (or any of its agents or Affiliates) of the Securities Act, the Exchange Act, any state securities law, or any rule or regulation promulgated under the Securities Act, the Exchange Act, or any state securities law.

1.7 “**Derivative Securities**” means any securities or rights convertible into, or exercisable or exchangeable for (in each case, directly or indirectly), Common Stock, including options and warrants.

1.8 [“**DPA**” means Section 721 of the Defense Production Act, as amended, including all implementing regulations thereof.]<sup>4</sup>

1.9 [“**DPA Triggering Rights**” means (i) “control” (as defined in the DPA); (ii) access to any “material non-public technical information” (as defined in the DPA) in the possession of the Company; (iii) membership or observer rights on the Board of Directors or equivalent governing body of the Company or the right to nominate an individual to a position on the Board of Directors or equivalent governing body of the Company; (iv) any involvement, other than through the voting of shares, in substantive decision-making of the Company regarding (x) the use, development, acquisition or release of any Company “critical technology” (as defined in the DPA); (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA).]<sup>5</sup>

1.10 “**Exchange Act**” means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

1.11 “**Excluded Registration**” means (i) a registration relating to the sale or grant of securities to employees of the Company or a subsidiary pursuant to a stock option, stock purchase, equity incentive or similar plan; (ii) a registration relating to an SEC Rule 145 transaction; (iii) a registration on any form that does not include substantially the same information as would be required to be included in a registration statement covering the sale of the Registrable Securities;

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<sup>3</sup> In this draft, this definition is used only as a limitation on allocation of rights to future stock issuances and not for transfer restrictions and information rights. See also footnote 38.

<sup>4</sup> To be included if needed for any of the CFIUS-related provisions below.

<sup>5</sup> To be included if needed for any of the CFIUS-related provisions below.

or (iv) a registration in which the only Common Stock being registered is Common Stock issuable upon conversion of debt securities that are also being registered.

1.12 [“**FOIA Party**” means a Person that, in the [reasonable] determination of the Board of Directors, may be subject to, and thereby required to disclose non-public information furnished by or relating to the Company under, the Freedom of Information Act, 5 U.S.C. 552 (“**FOIA**”), any state public records access law, any state or other jurisdiction’s laws similar in intent or effect to FOIA, or any other similar statutory or regulatory requirement.]

1.13 [“**Foreign Person**” means either (i) a Person or government that is a “foreign person” within the meaning of the DPA or (ii) a Person through whose investment a “foreign person” within the meaning of the DPA would obtain any DPA Triggering Rights.]<sup>6</sup>

1.14 “**Form S-1**” means such form under the Securities Act as in effect on the date hereof or any successor registration form under the Securities Act subsequently adopted by the SEC.

1.15 “**Form S-3**” means such form under the Securities Act as in effect on the date hereof or any registration form under the Securities Act subsequently adopted by the SEC that permits forward incorporation of substantial information by reference to other documents filed by the Company with the SEC.

1.16 “**GAAP**” means generally accepted accounting principles in the United States as in effect from time to time.

1.17 “**Holder**” means any holder of Registrable Securities who is a party to this Agreement.

1.18 “**Immediate Family Member**” means a child, stepchild, grandchild, parent, stepparent, grandparent, spouse, life partner or similar statutorily-recognized domestic partner, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships of a natural person referred to herein.

1.19 “**Initiating Holders**” means, collectively, Holders who properly initiate a registration request under this Agreement.

1.20 “**IPO**” means the Company’s first underwritten<sup>7</sup> public offering of its Common Stock under the Securities Act.

1.21 [“**Key Employee**” means any executive-level employee (including division director and vice president-level positions) as well as any employee who, either alone or in concert

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<sup>6</sup> To be included if needed for any of the CFIUS-related provisions below.

<sup>7</sup> Note that this would not include the creation of a public trading market for the Company’s shares by direct listing.

with others, develops, invents, programs, or designs any Company Intellectual Property (as defined in the Purchase Agreement).]<sup>8</sup>

1.22 [“**Key Holder Registrable Securities**” means (i) the [\_\_\_\_\_] shares of Common Stock held by the Key Holders, and (ii) any Common Stock issued as (or issuable upon the conversion or exercise of any warrant, right, or other security that is issued as) a dividend or other distribution with respect to, or in exchange for or in replacement of such shares.]

1.23 “**Major Investor**” means any Investor that, individually or together with such Investor’s Affiliates, holds at least [\_\_\_\_\_] shares of Registrable Securities (as adjusted for any stock split, stock dividend, combination, or other recapitalization or reclassification effected after the date hereof).

1.24 “**New Securities**” means, collectively, equity securities of the Company, whether or not currently authorized, as well as rights, options, or warrants to purchase such equity securities, or securities of any type whatsoever that are, or may become, convertible or exchangeable into or exercisable for such equity securities.

1.25 “**Person**” means any individual, corporation, partnership, trust, limited liability company, association or other entity.

1.26 “**Preferred Director**” means any director of the Company that the holders of record of [a class, classes or series of][Series A] Preferred Stock are entitled to elect, exclusively and as a separate class, pursuant to the Certificate of Incorporation.<sup>9</sup>

1.27 [“**Preferred Stock**” means, collectively, shares of the Company’s Series A Preferred Stock and Series [\_] Preferred Stock.]<sup>10</sup>

1.28 “**Registrable Securities**” means [(i) the Common Stock issuable or issued upon conversion of the [Series A] Preferred Stock[, excluding any Common Stock issued upon conversion of the [Series A] Preferred Stock pursuant to the “**Special Mandatory Conversion**” provisions of the Certificate of Incorporation]<sup>11</sup>; [(ii) any Common Stock, or any Common Stock issued or issuable (directly or indirectly) upon conversion and/or exercise of any other securities of the Company, acquired by the Investors after the date hereof]; [(iii) the Key Holder Registrable Securities,<sup>12</sup> provided, however, that such Key Holder Registrable Securities shall not be deemed

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<sup>8</sup> In a Series A round at a high-tech start-up, it is likely that the only key employees in addition to management, if any, are those who are responsible for developing the Company’s key intellectual property assets. It may be simpler for these early-stage companies to list the Key Employees by name. In later rounds, it may be appropriate to include others, *e.g.*, important salespeople or consultants and define Key Employees by function (*e.g.*, division director).

<sup>9</sup> If the holders of Series A Preferred Stock are not given the right to elect directors in the charter, refer instead to the Investor designees in the Voting Agreement.

<sup>10</sup> Note that this definition is unnecessary unless there are multiple series of preferred stock.

<sup>11</sup> If the Company’s Certificate of Incorporation contains a “pay-to-play” provision, consider whether shares issued upon a “Special Mandatory Conversion” pursuant thereto should lose their status as Registrable Securities. See Section 5A of Part B of Article Fourth of the Model Certificate of Incorporation.

<sup>12</sup> Typically, Key Holders of common stock are not granted registration rights. In certain instances it may be appropriate to grant Key Holders (*e.g.*, founders, significant early-round angel investors) piggyback and/or S-3 registration rights, although often they will be subordinate to investors on underwriter cutbacks. If such rights are

Registrable Securities and the Key Holders shall not be deemed Holders for the purposes of Sections 2.1 (and any other applicable Section or Section with respect to registrations under Section 2.1), 2.10, [3.1, 3.2, 4.1 and 6.6];] and [(iv)] any Common Stock issued as (or issuable upon the conversion or exercise of any warrant, right, or other security that is issued as) a dividend or other distribution with respect to, or in exchange for or in replacement of, the shares referenced [in clause[s] (i) [and (ii)]] above; excluding in all cases, however, any Registrable Securities sold by a Person in a transaction in which the applicable rights under this Agreement are not assigned pursuant to Section 6.1, and excluding for purposes of Section 2 any shares for which registration rights have terminated pursuant to Section 2.13 of this Agreement.<sup>13</sup>

1.29 “**Registrable Securities then outstanding**” means the number of shares determined by adding the number of shares of outstanding Common Stock that are Registrable Securities and the number of shares of Common Stock issuable (directly or indirectly) pursuant to then exercisable and/or convertible securities that are Registrable Securities.

1.30 “**Restricted Securities**” means the securities of the Company required to be notated with the legend set forth in Section 2.12(b) hereof.

1.31 “**SEC**” means the Securities and Exchange Commission.

1.32 “**SEC Rule 144**” means Rule 144 promulgated by the SEC under the Securities Act.

1.33 “**SEC Rule 145**” means Rule 145 promulgated by the SEC under the Securities Act.

1.34 “**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

1.35 “**Selling Expenses**” means all underwriting discounts, selling commissions, and stock transfer taxes applicable to the sale of Registrable Securities, and fees and disbursements of counsel for any Holder, except for the fees and disbursements of the Selling Holder Counsel borne and paid by the Company as provided in Section 2.6.

1.36 “**Series A Preferred Stock**” means shares of the Company’s Series A Preferred Stock, par value [\$0.\_\_\_\_] per share.

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granted, provision must be made throughout this form to include such rights and provide for appropriate cutbacks and limitations and protection in the event of amendments and waivers.

<sup>13</sup> Registrable Securities are defined in terms of common stock because preferred stock of venture-capital-backed companies is usually not sold or marketed at an IPO. The language “issued or issuable” should be present so that the definition works regardless of whether or not the preferred stock has yet been converted. Note that the effect of the transferability section is such that certain sizeable transfers of shares pursuant to available exemptions under the Securities Act will not remove the registration rights associated with those shares.

2. Registration Rights. The Company covenants and agrees as follows:

2.1 Demand Registration.

(a) Form S-1 Demand. If at any time after [the earlier of (i) [[insert date that is]<sup>14</sup> three (3) - five (5) years] after the date of this Agreement or (ii)] [one hundred eighty (180)] days<sup>15</sup> after the effective date of the registration statement for the IPO, the Company receives a request from Holders of [\_\_\_\_\_ percent (\_\_\_%)]<sup>16</sup> of the Registrable Securities then outstanding that the Company file a Form S-1 registration statement with respect to [at least forty percent (40%)]<sup>17</sup> of the Registrable Securities then outstanding [(or a lesser percent if the anticipated aggregate offering price, net of Selling Expenses, would exceed \$[five (5)- fifteen (15)] million)], then the Company shall: (x) within ten (10) days after the date such request is given, give notice thereof (the “**Demand Notice**”) to all Holders other than the Initiating Holders; and (y) as soon as practicable, and in any event within sixty (60) days after the date such request is given by the Initiating Holders, file a Form S-1 registration statement under the Securities Act covering all Registrable Securities that the Initiating Holders requested to be registered and any additional Registrable Securities requested to be included in such registration by any other Holders, as specified by notice given by each such Holder to the Company within [twenty (20)] days of the date the Demand Notice is given, and in each case, subject to the limitations of Sections 2.1(c) and 2.3[; provided, however, that this right to request the filing of a Form S-1 registration statement shall in no event be made available to any Holder that is a Foreign Person]<sup>18</sup>.

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<sup>14</sup> As investors’ counsel, to prevent inadvertent perpetual roll-forward, consider inserting a date certain that reflects the agreed upon time frame.

<sup>15</sup> The starting time period for initiating registration rights usually has these two components. The first time period is designed to allow the investors to force the Company to go public if it has not already done so (three (3) to five (5) years is common for this), although practically speaking this rarely, if ever, happens. The second time period is set around the expiration of any underwriter lock-ups after an IPO, which usually expire one hundred eighty (180) days after the IPO. See Section 2.11.

<sup>16</sup> As with all percentage vote thresholds, consideration will need to be given to whether any single investor can either control or block the vote. When dealing with multiple classes of preferred stock, it is important to understand the composition of the stockholder base to ensure that each series is getting the rights it bargained for. The Company will want this percentage to be high enough so that a significant portion of the investor base is behind the demand to cause the Company to effect a registered offering, particularly an IPO. Companies typically will resist allowing a single minority investor to cause a registration. Experienced investors will want to ensure that less experienced investors do not have the right to cause a demand registration. In some cases, holders of different series of preferred stock may request the right for that series to initiate a certain number of demand registrations. Companies typically will resist this due to the cost and diversion of management resources when multiple constituencies have this right.

<sup>17</sup> A trigger threshold may be negotiated and can range from twenty percent (20%) to one hundred percent (100%) of total Registrable Securities for demand registrations. However, some companies do not impose a threshold, relying instead on the minimum offering size.

<sup>18</sup> Note that the ability of a foreign investor (within the meaning of the regulations of the Committee on Foreign Investment in the United States (CFIUS)) to trigger an IPO on demand may give rise to a CFIUS determination that that investor has “control” over the Company. The concept of “control” under the CFIUS regulations is very broad and subjective. It is defined as the power – direct or indirect and whether or not exercised – to “determine, direct, or decide important matters affecting” the Company. This same principle applies throughout the financing documents. Parties may therefore wish to confirm that no foreign investor will obtain this particular right; other rights that are likely to be of concern are indicated throughout this document, and in addition, highly conservative companies may

(b) Form S-3 Demand. If at any time when it is eligible to use a Form S-3 registration statement, the Company receives a request from Holders [of at least [ten-thirty] percent ([10-30]%)]<sup>19</sup> of the Registrable Securities then outstanding that the Company file a Form S-3 registration statement with respect to outstanding Registrable Securities of such Holders having an anticipated aggregate offering price, net of Selling Expenses, of at least \$[three (3)- five (5)] million, then the Company shall (i) within ten (10) days after the date such request is given, give a Demand Notice to all Holders other than the Initiating Holders; and (ii) as soon as practicable, and in any event within [forty-five (45)] days after the date such request is given by the Initiating Holders, file a Form S-3 registration statement under the Securities Act covering all Registrable Securities requested to be included in such registration by any other Holders, as specified by notice given by each such Holder to the Company within [twenty (20)] days of the date the Demand Notice is given, and in each case, subject to the limitations of Sections 2.1(c) and 2.3.

(c) Notwithstanding the foregoing obligations, if the Company furnishes to Holders requesting a registration pursuant to this Section 2.1 a certificate signed by the Company's chief executive officer stating that in the good faith judgment of the Board of Directors it would be materially detrimental to the Company and its stockholders for such registration statement to either become effective or remain effective for as long as such registration statement otherwise would be required to remain effective, because such action would (i) materially interfere with a significant acquisition, corporate reorganization, or other similar transaction involving the Company; (ii) require premature disclosure of material information that the Company has a bona fide business purpose for preserving as confidential; or (iii) render the Company unable to comply with requirements under the Securities Act or Exchange Act, then the Company shall have the right to defer taking action with respect to such filing[, and any time periods with respect to filing or effectiveness thereof shall be tolled correspondingly,][for a period of not more than [thirty (30) - one hundred twenty (120)] days after the request of the Initiating Holders is given]; provided, however, that the Company may not invoke this right more than [once] in any twelve (12) month period<sup>20</sup>]; and provided further that the Company shall not register any securities for its own account or that of any other stockholder during such [thirty (30) - one hundred twenty (120)] day period other than [an Excluded Registration] [*Alternative*: pursuant to a registration relating to the sale or grant of securities to employees of the Company or a subsidiary pursuant to a stock option, stock purchase, equity incentive or similar plan; a registration on any form that does not include substantially the same information as would be required to be included in a registration statement covering the sale of the Registrable Securities; or a registration in which the only Common Stock

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wish to restrict foreign investors from obtaining any rights beyond the specific set of rights consistent with passivity outlined in the CFIUS regulations.

<sup>19</sup> As S-3 rights are not a large imposition, and the \$ threshold exists, consider no % floor.

<sup>20</sup> It is common to limit use of the blackout provisions to one time in any twelve (12) month period. Some companies seek blackouts twice in twelve (12) months or one time for every registration, but investors generally view this as too restrictive on investors (especially when combined with the delay period for Company registrations and the lock-up period). A common formulation is to permit one blackout of up to one hundred twenty (120) days in any twelve (12) month period. However, it provides greater flexibility to the Company and may also be better for the investors to provide instead for two sixty (60) day periods in any twelve (12) month period, which the Company can combine if necessary to achieve a total blackout of one hundred twenty (120) days.

being registered is Common Stock issuable upon conversion of debt securities that are also being registered]].<sup>21</sup>

(d) The Company shall not be obligated to effect, or to take any action to effect, any registration pursuant to Section 2.1(a), (i) during the period that is [sixty (60)] days before the Company's good faith estimate of the date of filing of, and ending on a date that is [one hundred eighty (180)] days after the effective date of, a Company-initiated registration, provided that the Company is actively employing in good faith commercially reasonable efforts to cause such registration statement to become effective; (ii) after the Company has effected [one (1) - two (2)] registration[s] pursuant to Section 2.1(a); or (iii) if the Initiating Holders propose to dispose of shares of Registrable Securities that may be immediately registered on Form S-3 pursuant to a request made pursuant to Section 2.1(b). The Company shall not be obligated to effect, or to take any action to effect, any registration pursuant to Section 2.1(b), (i) during the period that is [thirty (30)] days before the Company's good faith estimate of the date of filing of, and ending on a date that is [ninety (90)] days after the effective date of, a Company-initiated registration, provided that the Company is actively employing in good faith commercially reasonable efforts to cause such registration statement to become effective; or (ii) if the Company has effected [two (2)] registration[s] pursuant to Section 2.1(b) within the twelve (12) month period immediately preceding the date of such request. A registration shall not be counted as "effected" for purposes of this Section 2.1(d) until such time as the applicable registration statement has been declared effective by the SEC, unless the Initiating Holders withdraw their request for such registration, elect not to pay the registration expenses therefor, and forfeit their right to one demand registration statement pursuant to Section 2.6, in which case such withdrawn registration statement shall be counted as "effected" for purposes of this Section 2.1(d); provided, that if such withdrawal is during a period the Company has deferred taking action pursuant to Section 2.1(c), then the Initiating Holders may withdraw their request for registration and such registration will not be counted as "effected" for purposes of this Section 2.1(d).

2.2 Company Registration. If the Company proposes to register (including for this purpose a registration effected by the Company for stockholders other than the Holders) any of its [Common Stock][securities] under the Securities Act in connection with the public offering of such securities solely for cash (other than in an Excluded Registration[, a registration relating to a demand pursuant to Section 2.1][or the IPO]), the Company shall, at such time, promptly give each Holder notice of such registration. Upon the request of each Holder given within twenty (20) days after such notice is given by the Company, the Company shall, subject to the provisions of Section 2.3, cause to be registered all of the Registrable Securities that each such Holder has requested to be included in such registration. The Company shall have the right to terminate or withdraw any registration initiated by it under this Section 2.2 before the effective date of such registration, whether or not any Holder has elected to include Registrable Securities in such registration. The

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<sup>21</sup> Note that the alternative carve-out provision from the limitation on the Company's right to register securities for its own account during a blackout period does not include a carve-out for a registration relating to a SEC Rule 145 transaction. From the investors' perspective, although it may be acceptable for the Company to delay a resale registration in the circumstances set forth in this provision, those circumstances should not entitle the Company to file, *e.g.*, a Form S-4 for a Rule 145 transaction, in priority to a registration requested by the Holders of Registrable Securities. However, from the Company's perspective, the inability to file the Form S-4 could be a hindrance to an acquisition.

expenses (other than Selling Expenses) of such withdrawn registration shall be borne by the Company in accordance with Section 2.6.

### 2.3 Underwriting Requirements.

(a) If, pursuant to Section 2.1, the Initiating Holders intend to distribute the Registrable Securities covered by their request by means of an underwriting, they shall so advise the Company as a part of their request made pursuant to Section 2.1, and the Company shall include such information in the Demand Notice. The underwriter(s) will be selected by the [[Company]][Board of Directors] and shall be reasonably acceptable to a majority in interest of the Initiating Holders][*Alternative: Initiating Holders, subject only to the reasonable approval of the [Company] [Board of Directors]*]. In such event, the right of any Holder to include such Holder's Registrable Securities in such registration shall be conditioned upon such Holder's participation in such underwriting and the inclusion of such Holder's Registrable Securities in the underwriting to the extent provided herein. All Holders proposing to distribute their securities through such underwriting shall (together with the Company as provided in Section 2.4(e)) enter into an underwriting agreement in customary form with the underwriter(s) selected for such underwriting[; provided, however, that no Holder (or any of their assignees) shall be required to make any representations, warranties or indemnities except as they relate to such Holder's ownership of shares and authority to enter into the underwriting agreement and to such Holder's intended method of distribution, and the liability of such Holder shall be several and not joint, and limited to an amount equal to the net proceeds from the offering received by such Holder]. Notwithstanding any other provision of this Section 2.3, if the [managing] underwriter(s) advise(s) the Initiating Holders in writing that marketing factors require a limitation on the number of shares to be underwritten, then the Initiating Holders shall so advise all Holders of Registrable Securities that otherwise would be underwritten pursuant hereto, and the number of Registrable Securities that may be included in the underwriting shall be allocated among such Holders of Registrable Securities, including the Initiating Holders, in proportion (as nearly as practicable) to the number of Registrable Securities owned by each Holder or in such other proportion as shall mutually be agreed to by all such selling Holders; provided, however, that the number of Registrable Securities held by the Holders to be included in such underwriting shall not be reduced unless all other securities are first entirely excluded from the underwriting. [To facilitate the allocation of shares in accordance with the above provisions, the Company or the underwriters may round the number of shares allocated to any Holder to the nearest one hundred (100) shares.]

(b) In connection with any offering involving an underwriting of shares of the Company's capital stock pursuant to Section 2.2, the Company shall not be required to include any of the Holders' Registrable Securities in such underwriting unless the Holders accept the terms of the underwriting as agreed upon between the Company and its underwriters, and then only in such quantity as the underwriters in their sole discretion determine will not jeopardize the success of the offering by the Company. If the total number of securities, including Registrable Securities, requested by stockholders to be included in such offering exceeds the number of securities to be sold (other than by the Company) that the underwriters in their reasonable discretion determine is compatible with the success of the offering, then the Company shall be required to include in the offering only that number of such securities, including Registrable Securities, which the underwriters and the Company in their sole discretion determine will not jeopardize the success of the offering. If the underwriters determine that less than all of the Registrable Securities requested

to be registered can be included in such offering, then the Registrable Securities that are included in such offering shall be allocated among the selling Holders in proportion (as nearly as practicable to) the number of Registrable Securities owned by each selling Holder or in such other proportions as shall mutually be agreed to by all such selling Holders. [To facilitate the allocation of shares in accordance with the above provisions, the Company or the underwriters may round the number of shares allocated to any Holder to the nearest one hundred (100) shares.] Notwithstanding the foregoing, in no event shall (i) the number of Registrable Securities included in the offering be reduced unless all other securities (other than securities to be sold by the Company) are first entirely excluded from the offering, [or] (ii) the number of Registrable Securities included in the offering be reduced below [twenty-thirty] percent ([20-30]%) of the total number of securities included in such offering, unless such offering is the IPO, in which case the selling Holders may be excluded further if the underwriters make the determination described above and no other stockholder's securities are included in such offering [or (iii) notwithstanding (ii) above, any Registrable Securities which are not Key Holder Registrable Securities be excluded from such underwriting unless all Key Holder Registrable Securities are first excluded from such offering.]<sup>22</sup> For purposes of the provision in this Section 2.3(b) concerning apportionment, for any selling Holder that is a partnership, limited liability company, or corporation, the partners, members, retired partners, retired members, stockholders, and Affiliates of such Holder, or the estates and Immediate Family Members of any such partners, retired partners, members, and retired members and any trusts for the benefit of any of the foregoing Persons, shall be deemed to be a single "selling Holder," and any pro rata reduction with respect to such "selling Holder" shall be based upon the aggregate number of Registrable Securities owned by all Persons included in such "selling Holder," as defined in this sentence.

(c) For purposes of Section 2.1, a registration shall not be counted as "effected" if, as a result of an exercise of the underwriter's cutback provisions in Section 2.3(a), fewer than [fifty percent (50%)] of the total number of Registrable Securities that Holders have requested to be included in such registration statement are actually included.

2.4 Obligations of the Company. Whenever required under this Section 2 to effect the registration of any Registrable Securities, the Company shall, as expeditiously as reasonably possible:<sup>23</sup>

(a) prepare and file with the SEC a registration statement with respect to such Registrable Securities and use its commercially reasonable efforts<sup>24</sup> to cause such registration

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<sup>22</sup> This language is commonly referred to as the "underwriter cutback" section. In some offerings, an underwriter may determine it can successfully market only a certain number of securities and must therefore reduce the size of the overall registration. When this happens, the holders of Registrable Securities are generally entitled to include their shares before anybody else (consider whether later series may want priority over earlier series). If there is not enough room for these holders, the cutback should be pro rata based on shares held and not "shares requested to be included" (which only creates a race to request and an incentive to request all amounts held every time). Also, if Key Holders have been given registration rights, consider priority of cutback for such Key Holders.

<sup>23</sup> This section simply lists the undertakings of the Company in the event of a registration. As a practical matter, this language will be superseded by any underwriting agreement as part of an underwritten offering.

<sup>24</sup> Much ink has been spilled addressing the distinctions, or lack thereof, among the "best efforts," "commercially reasonable efforts," "reasonable efforts," and similar performance standards. This Agreement uses "commercially reasonable efforts" as the default performance standard.

statement to become effective and, upon the request of the Holders of a majority of the Registrable Securities registered thereunder, keep such registration statement effective for a period of up to one hundred twenty (120) days or, if earlier, until the distribution contemplated in the registration statement has been completed; provided, however, that (i) such one hundred twenty (120) day period shall be extended for a period of time equal to the period the Holder refrains, at the request of an underwriter of Common Stock (or other securities) of the Company, from selling any securities included in such registration[, and (ii) in the case of any registration of Registrable Securities on Form S-3 that are intended to be offered on a continuous or delayed basis, subject to compliance with applicable SEC rules, such one hundred twenty (120) day period shall be extended for up to [\_\_\_\_\_] days, if necessary, to keep the registration statement effective until all such Registrable Securities are sold];

(b) prepare and file with the SEC such amendments and supplements to such registration statement, and the prospectus used in connection with such registration statement, as may be necessary to comply with the Securities Act in order to enable the disposition of all securities covered by such registration statement;

(c) furnish to the selling Holders such numbers of copies of a prospectus, including a preliminary prospectus, as required by the Securities Act, and such other documents as the Holders may reasonably request in order to facilitate their disposition of their Registrable Securities;

(d) use its commercially reasonable efforts to register and qualify the securities covered by such registration statement under such other securities or blue-sky laws of such jurisdictions as shall be reasonably requested by the selling Holders; provided that the Company shall not be required to qualify to do business or to file a general consent to service of process in any such states or jurisdictions,<sup>25</sup> unless the Company is already subject to service in such jurisdiction and except as may be required by the Securities Act;

(e) in the event of any underwritten public offering, enter into and perform its obligations under an underwriting agreement, in usual and customary form, with the underwriter(s) of such offering;

(f) use its commercially reasonable efforts to cause all such Registrable Securities covered by such registration statement to be listed on a national securities exchange or trading system and each securities exchange and trading system (if any) on which similar securities issued by the Company are then listed;

(g) provide a transfer agent and registrar for all Registrable Securities registered pursuant to this Agreement and provide a CUSIP number for all such Registrable Securities, in each case not later than the effective date of such registration;

(h) promptly make available for inspection by the selling Holders, any [managing] underwriter(s) participating in any disposition pursuant to such registration statement,

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<sup>25</sup> This is generally viewed as a burdensome requirement for a Company, so it is often carved out of required registrations.

and any attorney or accountant or other agent retained by any such underwriter or selected by the selling Holders, all financial and other records, pertinent corporate documents, and properties of the Company, and cause the Company's officers, directors, employees, and independent accountants to supply all information reasonably requested by any such seller, underwriter, attorney, accountant, or agent, in each case, as necessary or advisable to verify the accuracy of the information in such registration statement and to conduct appropriate due diligence in connection therewith;<sup>26</sup>

(i) notify each selling Holder, promptly after the Company receives notice thereof, of the time when such registration statement has been declared effective or a supplement to any prospectus forming a part of such registration statement has been filed; and

(j) after such registration statement becomes effective, notify each selling Holder of any request by the SEC that the Company amend or supplement such registration statement or prospectus.

In addition, the Company shall ensure that, at all times after any registration statement covering a public offering of securities of the Company under the Securities Act shall have become effective, its insider trading policy shall provide that the Company's directors may implement a trading program under Rule 10b5-1 of the Exchange Act.

2.5 Furnish Information. It shall be a condition precedent to the obligations of the Company to take any action pursuant to this Section 2 with respect to the Registrable Securities of any selling Holder that such Holder shall furnish to the Company such information regarding itself, the Registrable Securities held by it, and the intended method of disposition of such securities as is reasonably required to effect the registration of such Holder's Registrable Securities.

2.6 Expenses of Registration. All expenses (other than Selling Expenses) incurred in connection with registrations, filings, or qualifications pursuant to Section 2, including all registration, filing, and qualification fees; printers' and accounting fees; fees and disbursements of counsel for the Company; and the reasonable fees and disbursements[, not to exceed \$\_\_\_\_\_ [per registration],] of one counsel for the selling Holders [selected by Holders of a majority of the Registrable Securities to be registered] ("**Selling Holder Counsel**"), shall be borne and paid by the Company; provided, however, that the Company shall not be required to pay for any expenses of any registration proceeding begun pursuant to Section 2.1 if the registration request is subsequently withdrawn at the request of the Holders of a majority of the Registrable Securities to be registered (in which case all selling Holders shall bear such expenses pro rata based upon the number of Registrable Securities that were to be included in the withdrawn registration), unless the Holders of a majority of the Registrable Securities agree to forfeit their right to one registration pursuant to Sections 2.1(a) or 2.1(b), as the case may be; provided further that if, at the time of such withdrawal, the Holders shall have learned of a material adverse change in the condition, business, or prospects of the Company from that known to the Holders at the time of their request and have withdrawn the request with reasonable promptness after learning of such information then the Holders shall not be required to pay any of such expenses and shall not forfeit their right

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<sup>26</sup> This inspection right is necessary to enable the selling Holders and underwriters to undertake their due diligence investigation in connection with the distribution. In facilitating the due diligence investigations, the Company must be sensitive to its obligations under Regulation FD under the Securities Act.

to one registration pursuant to Sections 2.1(a) or 2.1(b)]. All Selling Expenses relating to Registrable Securities registered pursuant to this Section 2 [(other than fees and disbursements of counsel to any Holder, other than the Selling Holder Counsel, which shall be borne solely by the Holder engaging such counsel)] shall be borne and paid by the Holders pro rata on the basis of the number of Registrable Securities registered on their behalf.

2.7 Delay of Registration. No Holder shall have any right to obtain or seek an injunction restraining or otherwise delaying any registration pursuant to this Agreement as the result of any controversy that might arise with respect to the interpretation or implementation of this Section 2.

2.8 Indemnification.<sup>27</sup> If any Registrable Securities are included in a registration statement under this Section 2:

(a) To the extent permitted by law, the Company will indemnify and hold harmless each selling Holder, and the partners, members, officers, directors, and stockholders of each such Holder; legal counsel and accountants for each such Holder; any underwriter (as defined in the Securities Act) for each such Holder; and each Person, if any, who controls such Holder or underwriter within the meaning of the Securities Act or the Exchange Act, against any Damages, and the Company will pay to each such Holder, underwriter, controlling Person, or other aforementioned Person any legal or other expenses reasonably incurred thereby in connection with investigating or defending any claim or proceeding from which Damages may result, as such expenses are incurred; provided, however, that the indemnity agreement contained in this Section 2.8(a) shall not apply to amounts paid in settlement of any such claim or proceeding if such settlement is effected without the consent of the Company, which consent shall not be unreasonably withheld, nor shall the Company be liable for any Damages to the extent that they arise out of or are based upon actions or omissions made in reliance upon and in conformity with written information furnished by or on behalf of any such Holder, underwriter, controlling Person, or other aforementioned Person expressly for use in connection with such registration [except to the extent such information has been corrected in a subsequent writing prior to or concurrently with the sale of Registrable Securities to the Person asserting the claim].

(b) To the extent permitted by law, each selling Holder, severally and not jointly, will indemnify and hold harmless the Company, and each of its directors, each of its officers who has signed the registration statement, each Person (if any), who controls the Company within the meaning of the Securities Act, legal counsel and accountants for the Company, any underwriter (as defined in the Securities Act), any other Holder selling securities in such registration statement, and any controlling Person of any such underwriter or other Holder, against any Damages, in each case only to the extent that such Damages arise out of or are based upon actions or omissions made in reliance upon and in conformity with written information furnished by or on behalf of such selling Holder expressly for use in connection with such registration [and has not been corrected in a subsequent writing prior to or concurrently with the sale of Registrable Securities to the Person asserting the claim]; and each such selling Holder will pay to the Company and each other aforementioned Person any legal or other expenses reasonably incurred thereby in connection with investigating or defending any claim or proceeding from which Damages may

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<sup>27</sup> Note that as a practical matter underwriting agreements also provide for indemnification obligations, and therefore it is important to review the indemnification provisions carefully in connection with underwritten public offerings.

result, as such expenses are incurred; provided, however, that the indemnity agreement contained in this Section 2.8(b) shall not apply to amounts paid in settlement of any such claim or proceeding if such settlement is effected without the consent of the Holder, which consent shall not be unreasonably withheld; and provided further that in no event shall the aggregate amounts payable by any Holder by way of indemnity or contribution under Section 2.8(b) and 2.8(d) exceed the proceeds from the offering received by such Holder (net of any Selling Expenses paid by such Holder), except in the case of fraud or willful misconduct by such Holder.

(c) Promptly after receipt by an indemnified party under this Section 2.8 of notice of the commencement of any action (including any governmental action) for which a party may be entitled to indemnification hereunder, such indemnified party will, if a claim in respect thereof is to be made against any indemnifying party under this Section 2.8, give the indemnifying party notice of the commencement thereof. The indemnifying party shall have the right to participate in such action and, to the extent the indemnifying party so desires, participate jointly with any other indemnifying party to which notice has been given, and to assume the defense thereof with counsel mutually satisfactory to the parties; provided, however, that an indemnified party (together with all other indemnified parties that may be represented without conflict by one counsel) shall have the right to retain one separate counsel, with the fees and expenses to be paid by the indemnifying party, if representation of such indemnified party by the counsel retained by the indemnifying party would be inappropriate due to actual or potential differing interests between such indemnified party and any other party represented by such counsel in such action. [The failure to give notice to the indemnifying party within a reasonable time of the commencement of any such action shall relieve such indemnifying party of any liability to the indemnified party under this Section 2.8, [only] to the extent that such failure materially prejudices the indemnifying party's ability to defend such action. The failure to give notice to the indemnifying party will not relieve it of any liability that it may have to any indemnified party otherwise than under this Section 2.8.]

(d) To provide for just and equitable contribution to joint liability under the Securities Act in any case in which either: (i) any party otherwise entitled to indemnification hereunder makes a claim for indemnification pursuant to this Section 2.8 but it is judicially determined (by the entry of a final judgment or decree by a court of competent jurisdiction and the expiration of time to appeal or the denial of the last right of appeal) that such indemnification may not be enforced in such case, notwithstanding the fact that this Section 2.8 provides for indemnification in such case, or (ii) contribution under the Securities Act may be required on the part of any party hereto for which indemnification is provided under this Section 2.8, then, and in each such case, such parties will contribute to the aggregate losses, claims, damages, liabilities, or expenses to which they may be subject (after contribution from others) in such proportion as is appropriate to reflect the relative fault of each of the indemnifying party and the indemnified party in connection with the statements, omissions, or other actions that resulted in such loss, claim, damage, liability, or expense, as well as to reflect any other relevant equitable considerations. The relative fault of the indemnifying party and of the indemnified party shall be determined by reference to, among other things, whether the untrue or allegedly untrue statement of a material fact, or the omission or alleged omission of a material fact, relates to information supplied by the indemnifying party or by the indemnified party and the parties' relative intent, knowledge, access to information, and opportunity to correct or prevent such statement or omission; provided, however, that, in any such case (x) no Holder will be required to contribute any amount in excess of the public offering price of all such Registrable Securities offered and sold by such Holder

pursuant to such registration statement, and (y) no Person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) will be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation; and provided further that in no event shall a Holder's liability pursuant to this Section 2.8(d), when combined with the amounts paid or payable by such Holder pursuant to Section 2.8(b), exceed the proceeds from the offering received by such Holder (net of any Selling Expenses paid by such Holder), except in the case of willful misconduct or fraud by such Holder.

(e) [Notwithstanding the foregoing, to the extent that the provisions on indemnification and contribution contained in the underwriting agreement entered into in connection with the underwritten public offering are in conflict with the foregoing provisions, the provisions in the underwriting agreement shall control; provided, however, that any matter expressly provided for or addressed by the foregoing provisions that is not expressly provided for or addressed by the underwriting agreement shall be controlled by the foregoing provisions.]

(f) Unless otherwise superseded by an underwriting agreement entered into in connection with the underwritten public offering, the obligations of the Company and Holders under this Section 2.8 shall survive the completion of any offering of Registrable Securities in a registration under this Section 2, and otherwise shall survive the termination of this Agreement or any provision(s) of this Agreement.

2.9 Reports Under Exchange Act. With a view to making available to the Holders the benefits of SEC Rule 144 and any other rule or regulation of the SEC that may at any time permit a Holder to sell securities of the Company to the public without registration or pursuant to a registration on Form S-3, the Company shall:

(a) make and keep available adequate current public information, as those terms are understood and defined in SEC Rule 144, at all times after the effective date of the registration statement filed by the Company for the IPO;

(b) use commercially reasonable efforts to file with the SEC in a timely manner all reports and other documents required of the Company under the Securities Act and the Exchange Act (at any time after the Company has become subject to such reporting requirements); and

(c) furnish to any Holder, so long as the Holder owns any Registrable Securities, forthwith upon request (i) to the extent accurate, a written statement by the Company that it has complied with the reporting requirements of SEC Rule 144 (at any time after ninety (90) days after the effective date of the registration statement filed by the Company for the IPO), the Securities Act, and the Exchange Act (at any time after the Company has become subject to such reporting requirements), or that it qualifies as a registrant whose securities may be resold pursuant to Form S-3 (at any time after the Company so qualifies); [(ii) a copy of the most recent annual or quarterly report of the Company and such other reports and documents so filed by the Company;<sup>28</sup>] and (iii) such other information as may be reasonably requested in availing any Holder of any rule

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<sup>28</sup> The value and necessity of obligations to provide copies of SEC-filed documents is questionable given the availability of all such documents on EDGAR.

or regulation of the SEC that permits the selling of any such securities without registration (at any time after the Company has become subject to the reporting requirements under the Exchange Act) or pursuant to Form S-3 (at any time after the Company so qualifies to use such form).

2.10 Limitations on Subsequent Registration Rights. From and after the date of this Agreement, the Company shall not, without the prior written consent of the Holders of [*specify percentage*] of the Registrable Securities then outstanding, enter into any agreement with any holder or prospective holder of any securities of the Company that would [(i) provide to such holder or prospective holder the right to include securities in any registration on other than either a pro rata basis with respect to the Registrable Securities or on a subordinate basis after all Holders have had the opportunity to include in the registration and offering all shares of Registrable Securities that they wish to so include][(i) allow such holder or prospective holder to include such securities in any registration unless, under the terms of such agreement, such holder or prospective holder may include such securities in any such registration only to the extent that the inclusion of such securities will not reduce the number of the Registrable Securities of the Holders that are included]; [or (ii) allow such holder or prospective holder to initiate a demand for registration of any securities held by such holder or prospective holder]; provided that this limitation shall not apply to Registrable Securities acquired by any additional Investor that becomes a party to this Agreement in accordance with Section 6.9.<sup>29</sup>

2.11 “Market Stand-off” Agreement.<sup>30</sup> Each Holder hereby agrees that it will not, without the prior written consent of the managing underwriter, during the period commencing on the date of the final prospectus relating to the registration by the Company [for its own behalf] of shares of its Common Stock or any other equity securities under the Securities Act on a registration statement on Form S-1 [or Form S-3], and ending on the date specified by the Company and the managing underwriter (such period not to exceed one hundred eighty (180) days in the case of the IPO [or ninety (90) days in the case of any registration other than the IPO]<sup>31</sup> [, or such other period as may be requested by the Company or an underwriter to accommodate regulatory restrictions on (1) the publication or other distribution of research reports and (2) analyst recommendations and opinions, including, but not limited to, the restrictions contained in applicable FINRA rules, or any

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<sup>29</sup> Attention should be given to ensure that this provision does not provide any particular investor with a blocking right on future securities issuances beyond what is included in the Certificate of Incorporation.

<sup>30</sup> This section sets forth the period during which the investors and other holders will be prohibited from selling their securities following the IPO and potentially other registrations. A lock-up agreement will typically be required by the underwriter and is usually set at one hundred eighty (180) days for an IPO. However, Investors and the Company may want to consider staged releases from the lock-up (*e.g.*, tied to stock to stock price performance), in order to mitigate the impact of a one hundred eighty (180)-day cliff. Because the principal investors in the Company will almost certainly be required to provide a lock-up agreement, the greatest value of the lock-up provision may be to ensure a similar lock-up of shares held by the smaller holders of Company stock. Note, however, that if some investors are released from the lock-up and sell under Rule 144, it can protect the Company and directors from potential Section 11 liability. See *Krim v. pcOrder.com, Inc.* 402 F.3d 489 (5th Cir. 2015) (holding that investors lack standing to bring a Section 11 claim where they cannot show with one hundred percent (100%) certainty that the shares they acquired in the open market were in fact registered in the allegedly false or misleading registration statement).

<sup>31</sup> The bracketed language provides for additional lock-ups for registrations other than the IPO. Some investors may have issues with being locked-up for any registration other than the IPO, but others may prefer to have this provision in order to help ensure the success of any subsequent offering. A compromise position might be to say that with respect to any offering other than the IPO the Holders would be subject to a lock-up if requested by the managing underwriter and approved by Holders of [X]% of the Registrable Securities.

successor provisions or amendments thereto)], (i) lend; offer; pledge; sell; contract to sell; sell any option or contract to purchase; purchase any option or contract to sell; grant any option, right, or warrant to purchase; or otherwise transfer or dispose of, directly or indirectly, any shares of Common Stock or any securities convertible into or exercisable or exchangeable (directly or indirectly) for Common Stock held immediately before the effective date of the registration statement for such offering<sup>32</sup> or (ii) enter into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of such securities, whether any such transaction described in clause (i) or (ii) above is to be settled by delivery of Common Stock or other securities, in cash, or otherwise. The foregoing provisions of this Section 2.11 [shall apply only to the IPO,] shall not apply to the sale of any shares to an underwriter pursuant to an underwriting agreement [or to the establishment of a trading plan pursuant to Rule 10b5-1, provided that such plan does not permit transfers during the restricted period], [or the transfer of any shares to any trust for the direct or indirect benefit of the Holder or the immediate family of the Holder, provided that the trustee of the trust agrees to be bound in writing by the restrictions set forth herein, and provided further that any such transfer shall not involve a disposition for value,] and shall be applicable to the Holders only if all officers and directors are subject to the same restrictions [and the Company uses commercially reasonable efforts to obtain a similar agreement from all stockholders individually owning more than [one - five] percent ([1-5]%) of the Company's outstanding Common Stock (after giving effect to conversion into Common Stock of all outstanding [Series A] Preferred Stock)<sup>33</sup>]. The underwriters in connection with such registration are intended third-party beneficiaries of this Section 2.11 and shall have the right, power and authority to enforce the provisions hereof as though they were a party hereto. Each Holder further agrees to execute such agreements as may be reasonably requested by the underwriters in connection with such registration that are consistent with this Section 2.11 or that are necessary to give further effect thereto. [Any discretionary waiver or termination of the restrictions of any or all of such agreements by the Company or the underwriters shall apply pro rata to all Company stockholders that are subject to such agreements, based on the number of shares subject to such agreements[, except that, notwithstanding the foregoing, the Company and the underwriters may, in their sole discretion, waive or terminate these restrictions with respect to up to [\_\_\_\_\_( )] shares of the Common Stock].<sup>34</sup>

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<sup>32</sup> Investors will want to exempt any common stock acquired in the IPO or in the public market after the IPO from the lock-up provisions, so that they are not disadvantaged relative to other public market purchasers.

<sup>33</sup> An alternative, commonly used provision makes this a requirement rather than a reasonable efforts standard. A potential problem with such formulation is that if not all larger stockholders are parties to this agreement or otherwise subject to the same restrictions then the failure to obtain a lock-up from even a single one of those stockholders would invalidate the entire provision. Consider also including a covenant requiring all future stockholders to sign a similar market stand-off provision. Compare Section 5.3, which applies only to employees.

<sup>34</sup> Sometimes *de minimis* thresholds are negotiated so that smaller employee stockholders in need of liquidity can be released without destroying all of the lock-ups and the offering. Note, however, that based on very recent experience with dealing with IPO underwriters, who are objecting to small holders not being subject to lock-ups, some funds are requiring that all stockholders be subject to lock-ups. Lawyers should be aware that even if this last bracketed sentence is included in this Agreement some underwriters will object to including similar language regarding discretionary waivers in the lock-up agreements they require in connection with an IPO. Investors having the benefit of the bracketed sentence can be reluctant to agree to a lock-up agreement less favorable, creating an issue that needs to be resolved to successfully complete the IPO.

## 2.12 Restrictions on Transfer.<sup>35</sup>

(a) The [Series A] Preferred Stock and the Registrable Securities shall not be sold, pledged, or otherwise transferred, and the Company shall not recognize and shall issue stop-transfer instructions to its transfer agent with respect to any such sale, pledge, or transfer, except upon the conditions specified in this Agreement, which conditions are intended to ensure compliance with the provisions of the Securities Act. A transferring Holder will cause any proposed purchaser, pledgee, or transferee of the [Series A] Preferred Stock and the Registrable Securities held by such Holder to agree to take and hold such securities subject to the provisions and upon the conditions specified in this Agreement. [Notwithstanding the foregoing, the Company shall not require any transferee of shares pursuant to an effective registration statement or, following the IPO, SEC Rule 144, in each case, to be bound by the terms of this Agreement.]

(b) Each certificate, instrument, or book entry representing (i) the [Series A] Preferred Stock, (ii) the Registrable Securities, and (iii) any other securities issued in respect of the securities referenced in clauses (i) and (ii), upon any stock split, stock dividend, recapitalization, merger, consolidation, or similar event, shall (unless otherwise permitted by the provisions of Section 2.12(c)) be notated with a legend substantially in the following form:

THE SECURITIES REPRESENTED HEREBY HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933. SUCH SHARES MAY NOT BE SOLD, PLEDGED, OR TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION OR A VALID EXEMPTION FROM THE REGISTRATION AND PROSPECTUS DELIVERY REQUIREMENTS OF SAID ACT.

THE SECURITIES REPRESENTED HEREBY MAY BE TRANSFERRED ONLY IN ACCORDANCE WITH THE TERMS OF AN AGREEMENT BETWEEN THE COMPANY AND THE STOCKHOLDER, A COPY OF WHICH IS ON FILE WITH THE SECRETARY OF THE COMPANY.

The Holders consent to the Company making a notation in its records and giving instructions to any transfer agent of the Restricted Securities in order to implement the restrictions on transfer set forth in this Section 2.12.

(c) The holder of such Restricted Securities, by acceptance of ownership thereof, agrees to comply in all respects with the provisions of this Section 2. Before any proposed sale, pledge, or transfer of any Restricted Securities, unless there is in effect a registration statement under the Securities Act covering the proposed transaction [or following the IPO, the transfer is made pursuant to SEC Rule 144], the Holder thereof shall give notice to the Company of such Holder's intention to effect such sale, pledge, or transfer[, provided that no such notice shall be required in connection if the intended sale, pledge or transfer complies with SEC Rule 144]. Each such notice shall describe the manner and circumstances of the proposed sale, pledge, or transfer in sufficient detail and, if reasonably requested by the Company, shall be accompanied at such

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<sup>35</sup> This Agreement does not prohibit the transfer of Registrable Securities to competitors. Some companies insist on providing for a flat prohibition on transfers to competitors; a less restrictive alternative would be to provide for a "right of first refusal" in favor of the Company, other investors, or Key Holders in the event of a proposed sale or transfer to a competitor. See also footnote 38.

Holder's expense by either (i) a written opinion of legal counsel who shall, and whose legal opinion shall, be reasonably satisfactory to the Company, addressed to the Company, to the effect that the proposed transaction may be effected without registration under the Securities Act; (ii) a "no action" letter from the SEC to the effect that the proposed sale, pledge, or transfer of such Restricted Securities without registration will not result in a recommendation by the staff of the SEC that action be taken with respect thereto; or (iii) any other evidence reasonably satisfactory to counsel to the Company to the effect that the proposed sale, pledge, or transfer of the Restricted Securities may be effected without registration under the Securities Act, whereupon the Holder of such Restricted Securities shall be entitled to sell, pledge, or transfer such Restricted Securities in accordance with the terms of the notice given by the Holder to the Company. The Company will not require such a notice, legal opinion or "no action" letter (x) in any transaction in compliance with SEC Rule 144; or (y) in any transaction in which such Holder distributes Restricted Securities to an Affiliate of such Holder for no consideration; provided that [with respect to transfers under the foregoing clause (y),] each transferee agrees in writing to be subject to the terms of this Section 2.12. Each certificate, instrument, or book entry representing the Restricted Securities transferred as above provided shall be notated with, except if such transfer is made pursuant to SEC Rule 144, the appropriate restrictive legend set forth in Section 2.12(b), except that such certificate instrument, or book entry shall not be notated with such restrictive legend if, in the opinion of counsel for such Holder and the Company, such legend is not required in order to establish compliance with any provisions of the Securities Act.

2.13 Termination of Registration Rights. The right of any Holder to request registration or inclusion of Registrable Securities in any registration pursuant to Sections 2.1 or 2.2 shall terminate upon [the earliest to occur of]:

(a) [the closing of a Deemed Liquidation Event, as such term is defined in the Certificate of Incorporation, [in which the consideration received by the Investors in such Deemed Liquidation Event is in the form of cash and/or publicly traded securities, or if the Investors receive registration rights from the acquiring company or other successor to the Company reasonably comparable to those set forth in this Section 2];]

(b) [such time after consummation of the IPO as SEC Rule 144 or another similar exemption under the Securities Act is available for the sale of all of such Holder's shares without limitation, during a three (3)-month period without registration [(and without the requirement for the Company to be in compliance with the current public information required under subsection (c)(1) of SEC Rule 144) and such Holder (together with its "affiliates" determined under SEC Rule 144) holds less than one percent (1%) of the outstanding capital stock of the Company];]<sup>36</sup>

(c) the [third-fifth] ([3<sup>rd</sup>-5<sup>th</sup>]) anniversary of the [IPO] [(or such later date that is one hundred eighty (180) days following the expiration of all deferrals of the Company's obligations pursuant to Section 2 that remain in effect as of the [third-fifth] ([3<sup>rd</sup>-5<sup>th</sup>]) anniversary of the consummation of the IPO)].

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<sup>36</sup> The language preserves registration rights for larger holders who may be subject to lock ups and other constraints on transferability including volume limitations and/or spikes.

### 3. Information and Observer Rights.

3.1 Delivery of Financial Statements. The Company shall deliver to each Major Investor<sup>37</sup>[, provided that the Board of Directors has not reasonably determined that such Major Investor is a competitor of the Company<sup>38</sup>]:

(a) as soon as practicable, but in any event within [ninety - one hundred twenty (90-120)] days after the end of each fiscal year of the Company (i) a balance sheet as of the end of such year, (ii) statements of income and of cash flows for such year[, and a comparison between (x) the actual amounts as of and for such fiscal year and (y) the comparable amounts for the prior year and as included in the Budget (as defined in Section 3.1(e)) for such year, with an explanation of any material differences between such amounts and a schedule as to the sources and applications of funds for such year], and (iii) a statement of stockholders' equity as of the end of such year[, all such financial statements audited and certified by independent public accountants of [nationally][regionally] recognized standing selected by the Company];<sup>39</sup>

(b) as soon as practicable, but in any event within forty-five (45) days after the end of each quarter of each fiscal year of the Company, unaudited statements of income and cash flows for such fiscal quarter, and an unaudited balance sheet [and a statement of stockholders' equity] as of the end of such fiscal quarter, all prepared in accordance with GAAP (except that such financial statements may (i) be subject to normal year-end audit adjustments; and (ii) not contain all notes thereto that may be required in accordance with GAAP);

(c) [as soon as practicable, but in any event within forty-five (45) days after the end of each quarter of each fiscal year of the Company, a statement showing the number of shares of each class and series of capital stock and securities convertible into or exercisable for shares of capital stock outstanding at the end of the period, the Common Stock issuable upon conversion or exercise of any outstanding securities convertible or exercisable for Common Stock and the exchange ratio or exercise price applicable thereto, and the number of shares of issued stock options and stock options not yet issued but reserved for issuance, if any, all in sufficient detail as to permit the Major Investors to calculate their respective percentage equity ownership in the Company, and certified by the chief financial officer or chief executive officer of the Company as being true, complete, and correct;]

(d) [as soon as practicable, but in any event within thirty (30) days after the end of each month, an unaudited income statement [and statement of cash flows] for such month, and an unaudited balance sheet [and statement of stockholders' equity] as of the end of such month, all prepared in accordance with GAAP (except that such financial statements may (i) be subject to

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<sup>37</sup> The share-ownership minimum for receiving financial information is negotiable, but is often set at the holdings of the smallest venture capital investor. It should be set high enough to avoid burdensome disclosure requirements on the Company, but low enough to provide investors with information if they really need it.

<sup>38</sup> This provision grants the Board the discretion to define "competitor" rather than using the defined term Competitor, but there are alternative ways that are more investor-friendly. For example, "competitors" could be defined as a select group of companies on a schedule.

<sup>39</sup> Consider the Company's stage of development, costs, and timing associated with audited financial statements as well as the use of nationally vs. regionally recognized accountants. Further, as a practical matter, "nationally recognized" accounting firms may not readily accept engagements by early stage companies.

normal year-end audit adjustments and (ii) not contain all notes thereto that may be required in accordance with GAAP);]

(e) as soon as practicable, but in any event thirty (30) days before the end of each fiscal year, a budget and business plan for the next fiscal year, prepared on a monthly basis, including balance sheets, income statements, and statements of cash flow for such months and, promptly after prepared, any other budgets or revised budgets prepared by the Company (such budget and business plan that is approved by the Board of Directors [(including the vote of [one/each] of the Preferred Directors then seated, the “**Requisite Preferred Director Vote**”)] is collectively referred to herein as the “**Budget**”);

(f) [with respect to the financial statements called for in Section 3.1(a), Section 3.1(b) [and Section 3.1(d)], an instrument executed by the chief financial officer and chief executive officer of the Company certifying that such financial statements were prepared in accordance with GAAP consistently applied with prior practice for earlier periods (except as otherwise set forth in Section 3.1(b) [and Section 3.1(d)]) and fairly present the financial condition of the Company and its results of operation for the periods specified therein; and]

(g) [such other information<sup>40</sup> relating to the financial condition, business, prospects, or corporate affairs of the Company as any Major Investor may from time to time reasonably request; provided, however, that the Company shall not be obligated under this Section 3.1 to provide information (i) that the Company reasonably determines in good faith to be a trade secret or confidential information (unless covered by an enforceable confidentiality agreement, in a form acceptable to the Company); or (ii) the disclosure of which would adversely affect the attorney-client privilege between the Company and its counsel.]

If, for any period, the Company has any subsidiary whose accounts are consolidated with those of the Company, then in respect of such period the financial statements delivered pursuant to the foregoing sections shall be the consolidated and consolidating financial statements of the Company and all such consolidated subsidiaries.

Notwithstanding anything else in this Section 3.1 to the contrary, the Company may cease providing the information set forth in this Section 3.1 during the period starting with the date [thirty (30) - sixty (60)] days before the Company’s good-faith estimate of the date of filing of a registration statement if it reasonably concludes it must do so to comply with the SEC rules applicable to such registration statement and related offering; provided that the Company’s covenants under this Section 3.1 shall be reinstated at such time as the Company is no longer actively employing its commercially reasonable efforts to cause such registration statement to become effective.

**3.2 Inspection.** The Company shall permit each Major Investor [(provided that the Board of Directors has not reasonably determined that such Major Investor is a competitor of the Company)], at such Major Investor’s expense, to visit and inspect the Company’s properties;

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<sup>40</sup> Some investors request that the Company provide information relating to material litigation, regulatory matters, material defaults under credit facilities, and other material events and occurrences. Note, however, that if the investing entity is entitled to a Board seat, there is little need (at least for that particular investor) to impose these additional reporting obligations on the Company.

examine its books of account and records; and discuss the Company's affairs, finances, and accounts with its officers, during normal business hours of the Company as may be reasonably requested by the Major Investor; provided, however, that the Company shall not be obligated pursuant to this Section 3.2 to provide access to any information that it reasonably and in good faith considers to be a trade secret or confidential information (unless covered by an enforceable confidentiality agreement, in form acceptable to the Company) or the disclosure of which would adversely affect the attorney-client privilege between the Company and its counsel.

3.3 Observer Rights. As long as [\_\_\_\_\_] owns not less than [[\_\_\_\_\_] percent [(\_\_\_\_%)] of the shares of the [Series A] Preferred Stock it is purchasing under the Purchase Agreement] (or an equivalent amount of Common Stock issued upon conversion thereof), the Company shall invite a representative of [\_\_\_\_\_] <sup>41</sup> to attend all meetings of the Board of Directors in a nonvoting observer capacity and, in this respect, shall give such representative copies of all notices, minutes, consents, and other materials that it provides to its directors [at the same time and in the same manner as provided to such directors]; provided, however, that such representative shall agree to hold in confidence all information so provided; and provided further, that the Company reserves the right to withhold any information and to exclude such representative from any meeting or portion thereof if access to such information or attendance at such meeting could adversely affect the attorney-client privilege between the Company and its counsel or result in disclosure of trade secrets or a conflict of interest, or if such Investor or its representative is a competitor of the Company.] <sup>42</sup>

3.4 Termination of Information [and Observer Rights]. The covenants set forth in Section 3.1[,] [and] Section 3.2[, and Section 3.3] shall terminate and be of no further force or effect (i) immediately before the consummation of the IPO, <sup>43</sup> [or] (ii) when the Company first becomes subject to the periodic reporting requirements of Section 12(g) or 15(d) of the Exchange Act, [or (iii) upon the closing of a Deemed Liquidation Event[, as such term is defined in the Certificate of Incorporation,] whichever event occurs first]; provided, that, with respect to clause (iii), the covenants set forth in Section 3.1 shall only terminate if the consideration received by the Investors in such Deemed Liquidation Event is in the form of cash and/or publicly traded securities or if the Investors receive financial information from the acquiring company or other successor to the Company comparable to those set forth in Section 3.1].

3.5 Confidentiality. Each Investor agrees that such Investor will keep confidential and will not disclose, divulge, or use for any purpose (other than to monitor or make decisions with

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<sup>41</sup> Note that inclusion of an observer right for a foreign investor is often inconsistent with a passive investment by that foreign investor within the meaning of the CFIUS regulations. Moreover, not only are observer rights "inconsistent with a passive investment," affording a foreign investor observer rights can trigger CFIUS jurisdiction even if CFIUS were to find that the investor did not control the Company (*i.e.*, observer rights are expressly identified as among the rights that can trigger CFIUS jurisdiction). This issue is frequently dealt with in a side letter providing that, notwithstanding anything to the contrary in the financing documents, the foreign investor will not get a board observer, among other rights.

<sup>42</sup> If the party with an observer is a strategic (vs. traditional venture) investor, consider other appropriate limitations, such as for competition or other conflicts of interest.

<sup>43</sup> Because the Company will be a reporting company under the Exchange Act following any registered public offering, the Company will be required to limit information provided to Investors to the information filed with the SEC under the Exchange Act.

respect to its investment in the Company) any confidential information obtained from the Company pursuant to the terms of this Agreement (including notice of the Company's intention to file a registration statement), unless such confidential information (a) is known or becomes known to the public in general (other than as a result of a breach of this Section 3.5 by such Investor), (b) is or has been independently developed or conceived by such Investor without use of the Company's confidential information, or (c) is or has been made known or disclosed to such Investor by a third party without a breach of any obligation of confidentiality such third party may have to the Company; provided, however, that an Investor may disclose confidential information (i) to its attorneys, accountants, consultants, and other professionals to the extent reasonably necessary to obtain their services in connection with monitoring its investment in the Company; (ii) to any prospective purchaser of any Registrable Securities from such Investor, if such prospective purchaser agrees to be bound by the provisions of this Section 3.5;<sup>44</sup> (iii) to any [existing or prospective]<sup>45</sup> Affiliate, partner, member, stockholder, or wholly owned subsidiary of such Investor in the ordinary course of business, provided that such Investor informs such Person that such information is confidential and directs such Person to maintain the confidentiality of such information; or (iv) as may otherwise be required by law, regulation, rule, court order or subpoena, provided that such Investor promptly notifies the Company of such disclosure and takes reasonable steps to minimize the extent of any such required disclosure.

3.6 [Limitation on Foreign Person Investors]. Notwithstanding the covenants set forth in Section 3.1 and Section 3.2, the Company shall not provide any Investor that is a Foreign Person access to any "material non-public technical information" within the meaning of the DPA.<sup>46</sup>

3.7 [Waiver of Statutory Information Rights]. Each Investor hereby acknowledges and agrees that until the consummation of the IPO, such Investor shall hereby be deemed to have unconditionally and irrevocably, to the fullest extent permitted by law, on behalf of such Investor and all beneficial owners of the shares of Common Stock or [Series A] Preferred Stock owned by such Investor (a "**Beneficial Owner**"), waived any rights such Investor or a Beneficial Owner might otherwise have had under Section 220 of the Delaware General Corporation Law (or under similar rights under other applicable law) to inspect for any proper purpose and to make copies and extracts from the Company's stock ledger, a list of its stockholders and its other books and records or the books and records of any subsidiary. This waiver applies only in such Investor's capacity as a stockholder and does not affect any other information and inspection rights such

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<sup>44</sup> Consider including language to prohibit disclosure of confidential information to any competitor.

<sup>45</sup> The bracketed language is a (pro-investor) provision intended to give Investors the ability to provide such information to prospective limited partners, members and other investors which may be important to an Investor, though note that companies may be uncomfortable extending the group which has access to their confidential information this far and may prefer to deal with this issue on a case by case basis.

<sup>46</sup> Inclusion of this limitation is appropriate in cases in which there is a foreign person investing into the Company but that investor intends to avoid obtaining any rights that might trigger CFIUS intervention. In such cases, depending on the nature of the U.S. business, the foreign investor may need to avoid obtaining access to any "material non-public technical information," which in turn may restrict certain types of information sharing contemplated under the sections addressing information and inspection rights, above. However, these limitations should not impact the foreign investor's ability to obtain financial information about the performance of the U.S. business. As a practical matter, as it may be unclear what constitutes "material nonpublic technical information," so it may be preferable in some cases to expressly provide that a foreign investor will be limited to receiving financial information regarding the performance of the Company.

Investor may expressly have pursuant to Sections 3.1 and 3.2 of this Agreement. Each Investor hereby further warrants and represents that such Investor has reviewed this waiver with its legal counsel, and that such Investor knowingly and voluntarily waives its rights otherwise provided by Section 220 of the Delaware General Corporation Law (or under similar rights under other applicable law).]<sup>47</sup>

#### 4. Rights to Future Stock Issuances.

4.1 Right of First Offer. Subject to the terms and conditions of this Section 4.1 and applicable securities laws, if the Company proposes to offer or sell any New Securities, the Company shall first offer such New Securities to each [Major Investor].<sup>48</sup> A Major Investor shall be entitled to apportion the right of first offer hereby granted to it in such proportions as it deems appropriate, among (i) itself, (ii) its Affiliates [and (iii) its beneficial interest holders, such as limited partners, members or any other Person having “beneficial ownership,” as such term is defined in Rule 13d-3 promulgated under the Exchange Act, of such Major Investor (“**Investor Beneficial Owners**”); provided that each such Affiliate or Investor Beneficial Owner (x) is not a Competitor or FOIA Party, unless such party’s purchase of New Securities is otherwise consented to by the Board of Directors, (y) agrees to enter into this Agreement and each of the [Amended and Restated] Voting Agreement of even date herewith among the Company, the Investors and the other parties named therein, as an “**Investor**” under each such agreement (provided that any Competitor or FOIA Party shall not be entitled to any rights as a Major Investor under Sections 3.1, 3.2 and 4.1 hereof), and (z) agrees to purchase at least such number of New Securities as are allocable hereunder to the Major Investor holding the fewest number of [Series A] Preferred Stock and any other Derivative Securities].

(a) The Company shall give notice (the “**Offer Notice**”) to each Major Investor, stating (i) its bona fide intention to offer such New Securities, (ii) the number of such New Securities to be offered, and (iii) the price and terms, if any, upon which it proposes to offer such New Securities.

(b) By notification to the Company within twenty (20) days after the Offer Notice is given, each Major Investor may elect to purchase or otherwise acquire, at the price and on the terms specified in the Offer Notice, up to that portion of such New Securities<sup>49</sup> which equals the proportion that the Common Stock then held by such Major Investor (including all shares of

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<sup>47</sup> The Company and the investors may desire to have the Company’s stockholders waive statutory rights to information about the Company. If including this provision, consider whether waivers should be obtained from stockholders who are not party to this agreement. Such a waiver should be included in a contract between the Company and the applicable stockholders, and will not be effective when included in the Company’s bylaws or charter.

<sup>48</sup> Here this right is provided to only a few select investors (“**Major Investors**”), to avoid unduly complicating subsequent financing rounds.

<sup>49</sup> The Board may elect to reserve only a portion of the round for existing investors, with the balance to be offered exclusively to new investors. If so, then the phrase “set aside by the Board of Directors for purchase by existing investors” or similar language should be inserted immediately before the footnote reference above. (See similar language in definition of “Offered Securities” in pay-to-play section (“**Special Mandatory Conversion**”) of Model Certificate of Incorporation.) Some investors might view a provision authorizing the Board to allocate only a portion of the New Securities for purchase under Section 4 as eviscerating the investors’ right of first offer unless a minimum portion of the new offering must be set aside. Consequently, existing stockholders will usually be entitled to subscribe for all New Securities but will waive their rights in order to facilitate investment by new investors.

Common Stock then issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of the [Series A] Preferred Stock and any other Derivative Securities then held by such Major Investor) bears to the total Common Stock of the Company [then outstanding (assuming full conversion and/or exercise, as applicable, of all [Series A] Preferred Stock and any other Derivative Securities then outstanding)][*Alternative*: then held by all the Major Investors (including all shares of Common Stock issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of the [Series A] Preferred Stock and any other Derivative Securities then held by all the Major Investors)].<sup>50</sup> At the expiration of such twenty (20) day period, the Company shall promptly notify each Major Investor that elects to purchase or acquire all the shares available to it (each, a “**Fully Exercising Investor**”) of any other Major Investor’s failure to do likewise. During the ten (10) day period commencing after the Company has given such notice, each Fully Exercising Investor may, by giving notice to the Company, elect to purchase or acquire, in addition to the number of shares specified above, up to that portion of the New Securities for which Major Investors were entitled to subscribe but that were not subscribed for by the Major Investors which is equal to the proportion that the Common Stock issued and held, or issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of [Series A] Preferred Stock and any other Derivative Securities then held, by such Fully Exercising Investor bears to the Common Stock issued and held, or issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of the [Series A] Preferred Stock and any other Derivative Securities then held, by all Fully Exercising Investors who wish to purchase such unsubscribed shares.<sup>51</sup> The closing of any sale pursuant to this Section 4.1(b) shall occur within the later of [ninety/one hundred twenty (90/120)] days of the date that the Offer Notice is given and the date of initial sale of New Securities pursuant to Section 4.1(c).

(c) If all New Securities referred to in the Offer Notice are not elected to be purchased or acquired as provided in Section 4.1(b), the Company may, during the [ninety (90)] day period following the expiration of the periods provided in Section 4.1(b), offer and sell the remaining unsubscribed portion of such New Securities to any Person or Persons at a price not less than, and upon terms no more favorable to the offeree than, those specified in the Offer Notice. If the Company does not enter into an agreement for the sale of the New Securities within such period, or if such agreement is not consummated within [thirty (30)] days of the execution thereof, the right provided hereunder shall be deemed to be revived and such New Securities shall not be offered unless first reoffered to the Major Investors in accordance with this Section 4.1.

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<sup>50</sup> The definition of this pro rata participation concept can be subject to negotiation. The numerator is generally based on common stock ownership or entitlement and should only include amounts held by the investor, including any shares of common stock that the investor may have purchased as common stock (for example, in a secondary transaction). The denominator is usually the fully diluted common stock of the Company before the issuance but can sometimes be cut back to exclude certain options or warrants, thereby increasing the number of shares available for purchase by holders of the purchase right, or can be limited (as in the alternative bracketed language) to securities held by the group with the purchase right (here, Major Investors), thereby making the purchase right a preemptive right in favor of such group.

<sup>51</sup> This is commonly referred to as a “gobble-up,” “over allotment,” or “oversubscription” provision and allows investors to purchase shares not purchased by other investors entitled to purchase rights. This is usually easy to negotiate, but some companies may resist allowing investors to exceed their current percentage ownership in the Company (which could limit shares available to potential new investors).

(d) The right of first offer in this Section 4.1 shall not be applicable to<sup>52</sup> (i) Exempted Securities (as defined in the Certificate of Incorporation); [and] (ii) shares of Common Stock issued in the IPO; and (iii) the issuance of shares of [Series A] Preferred Stock to Additional Purchasers pursuant to Section [1.3] of the Purchase Agreement.]

(e) [The right of first offer set forth in this Section 4.1 shall terminate with respect to any Major Investor who fails to purchase, in any transaction subject to this Section 4.1, all of such Major Investor's pro rata amount of the New Securities allocated (or, if less than such Major Investor's pro rata amount is offered by the Company, such lesser amount so offered) to such Major Investor pursuant to this Section 4.1. Following any such termination, such Investor shall no longer be deemed a "**Major Investor**" for any purpose of this Section 4.1]

(f) [Notwithstanding any provision hereof to the contrary, in lieu of complying with the provisions of this Section 4.1, the Company may elect to give notice to the Major Investors within thirty (30) days after the issuance of New Securities. Such notice shall describe the type, price, and terms of the New Securities. Each Major Investor shall have twenty (20) days from the date notice is given to elect to purchase up to the number of New Securities that would, if purchased by such Major Investor, maintain such Major Investor's percentage-ownership position, calculated as set forth in Section 4.1(b) before giving effect to the issuance of such New Securities.]<sup>53</sup>

4.2 Termination. The covenants set forth in Section 4.1 shall terminate and be of no further force or effect (i) immediately before the consummation of the IPO, or (ii) upon the closing of a Deemed Liquidation Event[, as such term is defined in the Certificate of Incorporation,] [in which the consideration received by the Investors in such Deemed Liquidation Event is in the form of cash and/or publicly traded securities, or if the Investors receive participation rights from the acquiring company or other successor to the Company reasonably comparable to those set forth in this Section 4] whichever event occurs first [and, as to each Major Investor, in accordance with Section 4.1(e)].

4.3 [Limitation on Foreign Person Investors]. Notwithstanding the covenants set forth in Section 4.1 [and Section 4.2], no Investor that is a Foreign Person shall be permitted to obtain greater than nine and nine-tenths percent (9.9%) of the outstanding voting shares of the Company.]<sup>54</sup>

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<sup>52</sup> These provisions should generally be consistent with the carve-outs to antidilution protection contained in the Certificate of Incorporation. However, additional exclusions may be negotiated, and more Company flexibility may be afforded here than in the similar antidilution carve-outs in the Certificate of Incorporation, since preemptive rights are usually considered a less important investor right than a conversion price adjustment.

<sup>53</sup> If this provision is included in the Agreement, careful attention should be paid to the denominator used in the calculation of the pro rata participation right. Note that this language will not work if Section 4.1 has been set up to give investors a preemptive right to purchase all shares offered. See footnotes 49 and 5050.

<sup>54</sup> Inclusion of this limitation is appropriate in cases in which there is a foreign person investing into the Company but that investor intends to avoid obtaining any rights that might trigger CFIUS intervention. In such cases, depending on the nature of the U.S. business, the foreign investor may need to avoid obtaining "control," and in order to do so may need to stay below the CFIUS-designated passivity threshold of ten percent (10%) of outstanding voting shares. Generally, addition of this limitation would be paired with the addition in Section 3.6, above. Note also that keeping below the ten percent (10%) threshold is not a panacea, as ownership interests will have to be considered in the

## 5. Additional Covenants.

5.1 Insurance. The Company shall obtain, within ninety (90) days of the date hereof, from financially sound and reputable insurers Directors and Officers liability insurance and term “key person” insurance on [\_\_\_\_\_], each in an amount and on terms and conditions satisfactory to the Board of Directors, and will use commercially reasonable efforts to cause such insurance policies to be maintained until such time as the Board of Directors determines that such insurance should be discontinued. The key person policy shall name the Company as loss payee, and neither policy shall be cancelable by the Company without prior approval by the Board of Directors [, including the Requisite Preferred Director Vote,][and holders of a [majority] of the Preferred Stock]. [Notwithstanding any other provision of this Section 5.1 to the contrary, for so long as a Preferred Director is serving on the Board of Directors, the Company shall not cease to maintain a Directors and Officers liability insurance policy in an amount of at least [three (3)] million unless approved by such Preferred Director, [shall include the Investor[s] entitled to designate the Preferred Director pursuant to the Voting Agreement as additional insureds in such policy,]<sup>55</sup> and shall annually, within one hundred twenty (120) days after the end of each fiscal year of the Company, deliver to the Investors a certification that such a Directors and Officers liability insurance policy remains in effect.] [Each Key Holder hereby covenants and agrees that, to the extent such Key Holder is named under such key person policy, such Key Holder will execute and deliver to the Company, as reasonably requested, a written notice and consent form with respect to such policy.]<sup>56</sup>

5.2 Employee Agreements. Unless otherwise approved by the Board of Directors, [including the Requisite Preferred Director Vote,] the Company will cause (i) each Person now or hereafter employed by it or by any subsidiary (or engaged by the Company or any subsidiary as a consultant/independent contractor) with access to confidential information and/or trade secrets to enter into a nondisclosure, proprietary rights assignment and non-solicitation agreement [; and (ii) each Key Employee to enter into a noncompetition designed with the advice of counsel.]<sup>57</sup> In addition, the Company shall not amend, modify, terminate, waive, or otherwise alter, in whole or in part, any of the above-referenced agreements or any restricted stock agreement between the

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balancing test of control rights. In other words, a foreign investor may have eight percent (8%) of a company’s voting stock, but also have other rights that – when combined – constitute control. The list of rights that do not themselves constitute control are referenced in the CFIUS regulations. Limiting an investor’s rights to those enumerated rights, and remaining at ten percent (10%) or less, will in most cases qualify an investment as a “passive” investment not subject to CFIUS jurisdiction.

<sup>55</sup> When the fund is also an indemnified party under the indemnification agreement, it may be appropriate for the D&O policy to include an endorsement extending coverage to the fund.

<sup>56</sup> Key person insurance does not necessarily make sense for every company. A benefit of key person insurance is that, if done correctly, the proceeds payable are not taxable income to the Company. Such notice and consent is typically required in order to obtain the favorable tax treatment. Discuss with the Company’s insurance broker.

<sup>57</sup> You must look to the law of the state where the employee is based in order to determine what is permissible with respect to non-compete provisions. Such provisions (other than in connection with the sale of a business) are prohibited in California and may not be enforceable in other jurisdictions. In addition, some investors do not require such agreements on principled grounds or for fear that employees will request additional consideration in exchange for signing a noncompete/nonsolicit (and indeed the agreement may be invalid absent such additional consideration). Others take the view that it should be up to the Board on a case-by-case basis to determine whether any particular key employee is required to sign such an agreement. Noncompetes typically have a one (1) year duration, although state law may permit up to two (2) years.

Company and any employee, without the consent of the Board of Directors[, including the Requisite Preferred Director Vote].

5.3 Employee Stock. Unless otherwise approved by the Board of Directors, [including the Requisite Preferred Director Vote,] all [future]<sup>58</sup> employees of the Company who purchase, receive options to purchase, or receive awards of shares of the Company’s capital stock after the date hereof shall be required to execute restricted stock or option agreements, as applicable, providing for (i) vesting of shares over a [four (4)] year period, with the first [twenty-five percent (25%)] of such shares vesting following [twelve (12)] months of continued employment or service, and the remaining shares vesting in equal [monthly] installments over the following [thirty-six (36) months], and (ii) a market stand-off provision substantially similar to that in Section 2.11. Without the prior approval by the Board of Directors, [including the Requisite Preferred Director Vote,] the Company shall not amend, modify, terminate, waive or otherwise alter, in whole or in part, any stock purchase, stock restriction or option agreement with any existing employee or service provider if such amendment would cause it to be inconsistent with this Section 5.3. In addition, unless otherwise approved by the Board of Directors, [including the Requisite Preferred Director Vote,] the Company [(x) shall not offer or allow any acceleration of vesting, and (y)]<sup>59</sup> shall retain (and not waive) a “right of first refusal” on employee transfers until the Company’s IPO and shall have the right to repurchase unvested shares at cost upon termination of employment of a holder of restricted stock.

5.4 Qualified Small Business Stock. The Company shall use commercially reasonable efforts to cause the shares of [Series A] Preferred Stock [issued pursuant to the Purchase Agreement], as well as any shares into which such shares are converted, within the meaning of Section 1202(f) of the Internal Revenue Code (the “**Code**”), to constitute “qualified small business stock” as defined in Section 1202(c) of the Code; provided, however, that such requirement shall not be applicable if the Board of Directors determines, in its good-faith business judgment, that such qualification is inconsistent with the best interests of the Company. The Company shall submit to its stockholders (including the Investors) and to the Internal Revenue Service any reports that may be required under Section 1202(d)(1)(C) of the Code and the regulations promulgated thereunder. In addition, within (a) twenty (20) business days after any Investor’s written request therefor and (b) twenty (20) business days before the consummation of a Deemed Liquidation Event (as defined in the Certificate of Incorporation) or IPO, the Company shall deliver to the Investors a certificate in substantially the form of Annex 1. The Company shall use commercially reasonable efforts to ensure the accuracy of any such statement and any such factual information, but in no event shall the Company be liable to the Investors for any damages arising from any errors in the Company’s determination with respect to the applicability or interpretation of Section

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<sup>58</sup> Consultants rarely have a standard four (4) year schedule with a cliff, and awards grants to existing employees often do not have a vesting cliff. If it is important to the investors to set forth a standard “consultant” and “existing employee” vesting schedules, work with the Company to determine what is appropriate and revise the section appropriately to separately reflect the same.

<sup>59</sup> Lawyers may want to consider prohibiting subsequent issuances of restricted stock or grant of stock options containing any provisions for acceleration upon any event or circumstances (beyond those already provided in any previously-approved equity or option plan) without the approval of the Board of Directors[, including the Requisite Preferred Director Vote].

1202 of the Code, unless such determination shall have been given by the Company in a manner either grossly negligent or fraudulent.]

5.5 Matters Requiring Preferred Director Approval.<sup>60</sup> During such time or times as the holders of Preferred Stock are entitled to elect a Preferred Director and such seat is filled, the Company hereby covenants and agrees with each of the Investors that it shall not, without approval of the Board of Directors, which approval must include the Requisite Preferred Director Vote:

(a) make, or permit any subsidiary to make, any loan or advance to, or own any stock or other securities of, any subsidiary or other corporation, partnership, or other entity unless it is wholly owned by the Company;

(b) make, or permit any subsidiary to make, any loan or advance to any Person, including, without limitation, any employee or director of the Company or any subsidiary, except advances and similar expenditures in the ordinary course of business [or under the terms of an employee stock or option plan approved by the Board of Directors];

(c) guarantee, directly or indirectly, or permit any subsidiary to guarantee, directly or indirectly, any indebtedness except for trade accounts of the Company or any subsidiary arising in the ordinary course of business;

(d) [make any investment inconsistent with any investment policy approved by the Board of Directors;]

(e) incur any aggregate indebtedness in excess of \$[\_\_\_\_\_] that is not already included in the Budget (as defined in Section 3.1(e)), other than trade credit incurred in the ordinary course of business;

(f) hire, terminate, or change the compensation of the executive officers, including approving any option grants or stock awards to executive officers;

(g) change the principal business of the Company, enter new lines of business, or exit the current line of business;

(h) sell, assign, license, pledge, or encumber material technology or intellectual property, other than licenses granted in the ordinary course of business; or

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<sup>60</sup> There is a divergence of interest between the Company and the investors with respect to whether specified corporate acts should be subject to approval by the investors' designee to the Board. Other formulations could be: requiring the vote of a supermajority of the Board, or a majority of the non-management directors. There may be other deal-specific provisions to include in this list; by contrast, there may be provisions listed here that are not appropriate for a given transaction. These provisions should also be harmonized with the special investor approval rights (so-called "protective provisions") in the Certificate of Incorporation, to avoid overlap. In determining whether stockholder approval (the protective provisions in the COI) or director approval is appropriate for a given matter, consider (1) that the directors, unlike investors, have fiduciary duties; (2) that, as a practical matter, Board approval is easier to obtain than stockholder approval; and (3) the proportion of preferred shares held by funds whose partners sit on the Board. Additionally, if this Section 5.5 is used, the drafter should take care to include the applicable proviso in the Certificate of Incorporation to address the holding in *Sinchareonkul, v. Fahnmann*, 2015 WL 292314 (Del. Ch. Jan. 22, 2015).

(i) enter into any corporate strategic relationship involving the payment, contribution, or assignment by the Company or to the Company of money or assets greater than [five hundred thousand – one million] dollars (\$[500,000-1,000,000]).

5.6 Board Matters. The Company shall reimburse the [nonemployee] directors for all reasonable out-of-pocket travel expenses incurred (consistent with the Company’s travel policy) in connection with attending meetings of the Board of Directors. [The Company shall cause to be established, as soon as practicable after such request, and will maintain, an audit and compensation committee, each of which shall consist solely of non-management directors. Each non-employee director shall be entitled in such person’s discretion to be a member of [all] [the audit and compensation] committees of the Board of Directors.]<sup>61</sup>

5.7 Successor Indemnification. If the Company or any of its successors or assignees consolidates with or merges into any other Person and is not the continuing or surviving corporation or entity of such consolidation or merger, then to the extent necessary, proper provision shall be made so that the successors and assignees of the Company assume the obligations of the Company with respect to indemnification of members of the Board of Directors as in effect immediately before such transaction, whether such obligations are contained in the Company’s Bylaws, the Certificate of Incorporation, or elsewhere, as the case may be.

5.8 [Expenses of Counsel.] In the event of a transaction which is a Sale of the Company (as defined in the [Amended and Restated] Voting Agreement of even date herewith among the Investors, the Company and the other parties named therein), the reasonable fees and disbursements[, not to exceed \$\_\_\_\_,] of one counsel for the [Major] Investors (“**Investor Counsel**”), in their capacities as stockholders, shall be borne and paid by the Company. At the outset of considering a transaction which, if consummated would constitute a Sale of the Company, the Company shall obtain the ability to share with the Investor Counsel (and such counsel’s clients) and shall share the confidential information (including, without limitation, the initial and all subsequent drafts of memoranda of understanding, letters of intent and other transaction documents and related noncompete, employment, consulting and other compensation agreements and plans) pertaining to and memorializing any of the transactions which, individually or when aggregated with others would constitute the Sale of the Company. The Company shall be obligated to share (and cause the Company’s counsel and investment bankers to share) such materials when distributed to the Company’s executives and/or any one (1) or more of the other parties to such transaction(s). In the event that Investor Counsel deems it appropriate, in its reasonable discretion, to enter into a joint defense (or common interest) agreement or other arrangement to enhance the ability of the parties to protect their communications and other reviewed materials under the attorney client privilege, the Company shall, and shall direct its counsel to, execute and deliver to Investor Counsel and its clients such an agreement in form and substance reasonably acceptable to Investor Counsel and the Company’s counsel. In the event that one (1) or more of the other party or parties to such transactions require the clients of Investor Counsel to enter into a confidentiality agreement and/or joint defense (or common interest) agreement in order to receive such information, then the Company shall share whatever information can be shared without entry into such agreement and shall, at the same time, in good faith work expeditiously to enable Investor

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<sup>61</sup> Appropriate for later stage companies and/or larger boards.

Counsel and its clients to negotiate and enter into the appropriate agreement(s) without undue burden to the clients of Investor Counsel.]<sup>62</sup>

5.9 [Indemnification Matters]. The Company hereby acknowledges that one (1) or more of the Preferred Directors nominated to serve on the Board of Directors by one (1) or more Investors may have certain rights to indemnification, advancement of expenses and/or insurance provided by one (1) or more of the Investors and certain of their Affiliates (collectively, the “**Investor Indemnitors**”). The Company hereby agrees (a) that it is the indemnitor of first resort (*i.e.*, its obligations to any such Preferred Director are primary and any obligation of the Investor Indemnitors to advance expenses or to provide indemnification for the same expenses or liabilities incurred by such Preferred Director are secondary), (b) that it shall be required to advance the full amount of expenses incurred by such Preferred Director and shall be liable for the full amount of all expenses, judgments, penalties, fines and amounts paid in settlement by or on behalf of any such Preferred Director to the extent legally permitted and as required by the Certificate of Incorporation or Bylaws of the Company (or any agreement between the Company and such Preferred Director), without regard to any rights such Preferred Director may have against the Investor Indemnitors, and, (c) that it irrevocably waives, relinquishes and releases the Investor Indemnitors from any and all claims against the Investor Indemnitors for contribution, subrogation or any other recovery of any kind in respect thereof. The Company further agrees that no advancement or payment by the Investor Indemnitors on behalf of any such Preferred Director with respect to any claim for which such Preferred Director has sought indemnification from the Company shall affect the foregoing and the Investor Indemnitors shall have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery of such Preferred Director against the Company. The Preferred Directors and the Investor Indemnitors are intended third-party beneficiaries of this Section 5.9 and shall have the right, power and authority to enforce the provisions of this Section 5.9 as though they were a party to this Agreement.]<sup>63</sup>

5.10 [Right to Conduct Activities]. The Company hereby agrees and acknowledges that [insert VC organization entity name]<sup>64</sup> (together with its Affiliates) is a professional investment organization, and as such reviews the business plans and related proprietary information of many enterprises, some of which may compete directly or indirectly with the Company’s business (as currently conducted or as currently propose to be conducted). [Nothing in this Agreement shall preclude or in any way restrict the Investors from evaluating or purchasing securities, including publicly traded securities, of a particular enterprise, or investing or participating in any particular enterprise whether or not such enterprise has products or services which compete with those of the Company; and] the Company hereby agrees that, to the extent permitted under applicable law, [VC

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<sup>62</sup> Investors at times find that their interests are not perfectly aligned with those of management when it comes to the sale of a Company and/or that the matters of concern to them (*e.g.*, escrow provisions) are not necessarily important to management; providing for separate investor counsel ensures that someone is looking out for their interests at a crucial time.

<sup>63</sup> This provision, added in the wake of the Delaware Chancery Court’s decision in *Levy, et al. v. HLI Operating Company, Inc., et al.*, 2007 WL 1452934 (*Del.Ch.*), is designed to reinforce the priority of the Company’s indemnification of an investor director and to ensure that the investing entity itself is in direct contractual privity with the Company with respect to such priority (in contrast to an indemnification agreement between the Company and the individual director themselves).

<sup>64</sup> Or broaden to all investors if investor set are all professional investors

organization entity name] (and its Affiliates) shall not be liable to the Company for any claim arising out of, or based upon, (i) the investment by [VC organization entity name] (or its Affiliates) in any entity competitive with the Company, or (ii) actions taken by any partner, officer, employee or other representative of [VC organization entity name] (or its Affiliates) to assist any such competitive company, whether or not such action was taken as a member of the board of directors of such competitive company or otherwise, and whether or not such action has a detrimental effect on the Company; provided, however, that the foregoing shall not relieve (x) any of the Investors from liability associated with the unauthorized disclosure of the Company's confidential information obtained pursuant to this Agreement, or (y) any director or officer of the Company from any liability associated with his or her fiduciary duties to the Company.]

5.11 Anti-Harassment Policy. The Company shall, within sixty (60) days following the Closing (as defined in the Purchase Agreement), adopt and thereafter maintain in effect (i) a Code of Conduct governing appropriate workplace behavior and (ii) an Anti-Harassment and Discrimination Policy prohibiting discrimination and harassment at the Company. Such policy shall be reviewed and approved by the Board of Directors.<sup>65</sup>

5.12 FCPA. The Company covenants that it shall not (and shall not permit any of its subsidiaries or Affiliates or any of its or their respective directors, officers, managers, employees, independent contractors, representatives or agents to) promise, authorize or make any payment to, or otherwise contribute any item of value to, directly or indirectly, to any third party, including any Non-U.S. Official (as such term is defined in the U.S. Foreign Corrupt Practices Act of 1977, as amended (the "FCPA")), in each case, in violation of the FCPA, the U.K. Bribery Act, or any other applicable anti-bribery or anti-corruption law. The Company further covenants that it shall (and shall cause each of its subsidiaries and Affiliates to) cease all of its or their respective activities, as well as remediate any actions taken by the Company, its subsidiaries or Affiliates, or any of their respective directors, officers, managers, employees, independent contractors, representatives or agents in violation of the FCPA, the U.K. Bribery Act, or any other applicable anti-bribery or anti-corruption law. The Company further covenants that it shall (and shall cause each of its subsidiaries and Affiliates to) maintain systems of internal controls (including, but not limited to, accounting systems, purchasing systems and billing systems) to ensure compliance with the FCPA, the U.K. Bribery Act, or any other applicable anti-bribery or anti-corruption law. Upon request, the Company agrees to provide responsive information and/or certifications concerning its compliance with applicable anti-corruption laws. The Company shall promptly notify each Investor if the Company becomes aware of any Enforcement Action (as defined in the Purchase Agreement). The Company shall, and shall cause any direct or indirect subsidiary or entity controlled by it, whether now in existence or formed in the future, to comply with the FCPA. The Company shall use its best efforts to cause any direct or indirect subsidiary, whether now in existence or formed in the future, to comply in all material respects with all applicable laws.]<sup>66</sup>

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<sup>65</sup> Note that NVCA has available on its website model HR policies.

<sup>66</sup> Because FCPA compliance can be costly and time-consuming, consideration should be given to when and how it may be best implemented at an early-stage company. If including this provision in an early-stage deal, consider making specific practical recommendations to the Company regarding measures that the Company should take to establish and maintain FCPA compliance.

5.13 Cybersecurity. The Company shall, within one hundred eighty (180) days following the Closing [(as defined in the Purchase Agreement)], use commercially reasonable efforts to (a) identify and restrict access (including through physical and/or technical controls) to the Company’s confidential business information and trade secrets and any information about identified or identifiable natural persons maintained by or on behalf of the Company (collectively, “**Protected Data**”) to those individuals who have a need to access it and (b) implement reasonable physical, technical and administrative safeguards[ (“**Cybersecurity Solutions**”) ] designed to protect the confidentiality, integrity and availability of its technology and systems (including servers, laptops, desktops, cloud, containers, virtual environments and data centers) and all Protected Data. [The Company shall use commercially reasonable efforts to ensure that the Cybersecurity Solutions (x) are up-to-date and include industry-standard protections (e.g., antivirus, endpoint detection and response and threat hunting), (y) to the extent determined necessary by the Company or the Board of Directors, are backed by a breach prevention warranty from the vendor certifying the effectiveness of such solutions, and (z) require the vendors to notify the Company of any security incidents posing a risk to the Company’s information (regardless of whether information was actually compromised).]<sup>67</sup> The Company shall evaluate on a periodic basis at least annually whether such safeguards should be updated to maintain a level of security appropriate to the risk posed to Company systems and Protected Data. The Company shall educate its employees about the proper use and storage of Protected Data, including periodic training as determined reasonably necessary by the Company or the Board of Directors.

5.14 [Real Property Holding Corporation. Promptly following (and in any event within ten (10) days after receipt of) written request by an Investor, the Company shall provide such Investor with a written statement informing such Investor whether such Investor’s interest in the Company constitutes a United States real property interest. The Company’s determination shall comply with the requirements of Treasury Regulation Section 1.897-2(h)(1) or any successor regulation, and the Company shall provide timely notice to the Internal Revenue Service, in accordance with and to the extent required by Treasury Regulation Section 1.897-2(h)(2) or any successor regulation, that such statement has been made. The Company’s obligation to furnish such written statement shall continue notwithstanding the fact that a class of the Company’s stock may be regularly traded on an established securities market or the fact that there is no [Series A] Preferred Stock then outstanding.]<sup>68</sup>

5.15 [CFIUS and Foreign Person Limitations.

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<sup>67</sup> These requirements would be difficult if not impossible for many early stage companies to meet, especially within the one hundred eighty (180) day timeframe. “Industry standard” is a high bar that can be costly to clear and that many mature companies do not clear. Almost no relevant vendors will in practice offer a “breach prevention warranty” and most companies will not have leverage to dictate breach notice obligations to their vendors (e.g., Amazon, Google, Microsoft). Moreover, to the extent some of this would be reasonable to expect a company to do, it should be covered by the broad obligations created in the preceding sentence, which applies to both data handled by the Company as well as data handled on its behalf by vendors. Accordingly, only include if there are specific needs and concerns that cannot otherwise be addressed

<sup>68</sup> Due to recent changes in the tax law, venture capital funds will need to report to a transferring limited partner the extent to which a sale of the venture capital fund’s assets would generate U.S. tax obligations (and in some cases the venture capital fund will incur a withholding tax liability with respect thereto). In order to comply with these obligations, the venture capital fund will need to determine whether its interest in each portfolio company constitutes a United States real property interest.

(a) Unless otherwise approved by the Board of Directors, the Company will not provide to any Foreign Person any DPA Triggering Rights. No Investor who is a Foreign Person shall be permitted to obtain any DPA Triggering Rights or a voting equity interest in the Company that exceeds nine and nine-tenths percent (9.9%) of the Company’s total voting securities pursuant to the Purchase Agreement, Section 4 of this Agreement, or otherwise, including by way of any secondary transaction(s), without the approval of the Board of Directors.

(b) Each Investor covenants that it will notify the Company in advance of permitting any Foreign Person affiliated with Investor, whether affiliated as a limited partner or otherwise, to obtain through Investor any DPA Triggering Rights.]<sup>69 70</sup>

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<sup>69</sup> Inclusion of some or all of this covenant may be appropriate if the Company and some or all of the Investors want to be sure that neither the Company nor any existing investor will sell to a party that may raise CFIUS concerns without advance notification. Because CFIUS has significant flexibility in determining who may be considered a “foreign person” under its regulations, and thus restricting sales to such persons may remove a large number of potential investors, inclusion of these provisions may reduce the marketability of the Company’s shares. If the Company or Investors wish to provide the Company additional flexibility to address potential CFIUS requirements as they arise, further provisions could be added to this covenant, *e.g.*,: “Each Investor acknowledges and agrees that the Company is authorized, without the consent of any Person, including any Investor, to take any action as it determines, in its reasonable and good faith discretion, to be necessary or advisable to comply with the DPA and/or the laws, rules, regulations, directives, or special measures adopted or implemented by the Committee on Foreign Investment in the United States (“CFIUS”) pursuant to the DPA, which shall include (i) restricting access to facilities, information, and/or materials, including access to facilities, information, and/or materials that the Company may otherwise be required to provide pursuant to Section 3 and/or (ii) limiting or eliminating an Investor’s right of first offer pursuant to Section 4.” However, a grant of this kind of broad authority to the Company may have inadvertent side effects – *e.g.*, may result in the Company having the right to remove the board seat or observer rights of any Investor who becomes foreign after making its initial investment (*e.g.*, a fund that hires a foreign citizen general partner). Accordingly, parties should be confident that all sides are comfortable with the Company having broad powers to remove investors’ rights before including this type of language.

<sup>70</sup> In addition to concerns about future investors potentially triggering a CFIUS filing, investors may have concerns that the Company might enter into a more highly-controlled or sensitive line of business. If so, an additional covenant could be added to require the Company to notify some or all investors and/or take certain steps to isolate foreign parties. An example covenant follows. Alternative 1 addresses foreign investors who want to be notified as early as possible of the potential restrictions on their participation in future rounds of investment. Alternatives 2 and 3 cover U.S. investors and/or the Company if they want such a change in the Company’s products to trigger a pre-existing plan to limit Investors’ rights.

[5.16 Critical Technology Matters. If to the Company’s knowledge (i) any pre-existing products or services provided by the Company are re-categorized by the U.S. government as a critical technology within the meaning of the DPA, or would reasonably be considered to constitute the design, fabrication, development, testing, production or manufacture of a critical technology after a re-categorization of selected technologies by the U.S. government, or (ii) after execution of the Purchase Agreement, the Company engages in any activity that could reasonably be considered to constitute the design, fabrication, development, testing, production or manufacture of a critical technology within the meaning of the DPA:

*Alternative 1:* the Company shall promptly notify the [Major] Investors [that are known to the Company to be Foreign Persons] of (i) such change in the categorization of its products, services, or technology or (ii) its engagement in the design, fabrication, development, testing, production or manufacture of a critical technology.

*Alternative 2:* the Company and the Foreign Person Investors shall promptly enter into a Side Letter[, the form of which is set forth in Exhibit X,] limiting the rights of those Investors to preempt the need for any potential future filing pursuant to the DPA.

*Alternative 3:* the Company shall exercise its rights pursuant to Section [5.15] above, to remove any pre-existing DPA Triggering Rights held by any Foreign Person Investor.

5.16 Termination of Covenants. The covenants set forth in this Section 5, except for Section[s] 5.7, [5.8 and 5.9], shall terminate and be of no further force or effect [(i) immediately before the consummation of the IPO [, or (ii) upon a Deemed Liquidation Event[, as such term is defined in the Certificate of Incorporation], whichever event occurs first].<sup>71</sup>

6. Miscellaneous.

6.1 Successors and Assigns. The rights under this Agreement may be assigned (but only with all related obligations) by a Holder to a transferee of Registrable Securities that (i) is an Affiliate of a Holder; (ii) is a Holder's Immediate Family Member or trust for the benefit of an individual Holder or one (1) or more of such Holder's Immediate Family Members; or (iii) after such transfer, [holds at least [\_\_\_\_\_] shares of Registrable Securities (subject to appropriate adjustment for stock splits, stock dividends, combinations, and other recapitalizations)] [together with its Affiliates, would be a Major Investor]; provided, however, that (x) the Company is, within a reasonable time after such transfer, furnished with written notice of the name and address of such transferee and the Registrable Securities with respect to which such rights are being transferred; and (y) such transferee agrees in a written instrument delivered to the Company to be bound by and subject to the terms and conditions of this Agreement, including the provisions of Section 2.11. For the purposes of determining the number of shares of Registrable Securities held by a transferee, the holdings of a transferee (1) that is an Affiliate or stockholder of a Holder; (2) who is a Holder's Immediate Family Member; or (3) that is a trust for the benefit of an individual Holder or such Holder's Immediate Family Member shall be aggregated together and with those of the transferring Holder; provided further that all transferees who would not qualify individually for assignment of rights shall, as a condition to the applicable transfer, establish a single attorney-in-fact for the purpose of exercising any rights, receiving notices, or taking any action under this Agreement. The terms and conditions of this Agreement inure to the benefit of and are binding upon the respective successors and permitted assignees of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and permitted assignees any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided herein.

6.2 Governing Law.<sup>72</sup> This Agreement shall be governed by the internal law of the [State of Delaware],<sup>73</sup> without regard to conflict of law principles that would result in the application of any law other than the law of the [State of Delaware].

6.3 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*,

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<sup>71</sup> Compare to Sections 3.4 and 4.2

<sup>72</sup> After choosing the applicable law, the parties should determine whether such law imposes any particular requirements, such as special legends or other notices, in order to make restrictions on transfer of shares effective.

<sup>73</sup> Some practitioners may select Delaware law as it has historically been the richest source for corporation law precedent. Other practitioners will prefer to choose the (non-Delaware) jurisdiction in which they are admitted to practice, if for no other reason than not having to retain Delaware counsel in the event they are called upon to give an enforceability opinion.

www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

6.4 Titles and Subtitles. The titles and subtitles used in this Agreement are for convenience only and are not to be considered in construing or interpreting this Agreement.

6.5 Notices.

(a) All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt or (i) personal delivery to the party to be notified; (ii) when sent, if sent by electronic mail during the recipient's normal business hours, and if not sent during normal business hours, then on the recipient's next business day; (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (iv) one (1) business day after the business day of deposit with a nationally recognized overnight courier, freight prepaid, specifying next-day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their addresses as set forth on Schedule A [or Schedule B (as applicable)] hereto, or (as to the Company) to the principal office of the Company and to the attention of the Chief Executive Officer, or in any case to such email address or address as subsequently modified by written notice given in accordance with this Section 6.5. If notice is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to [*Company counsel name and address*] [and if notice is given to Investors, a copy (which copy shall not constitute notice) shall also be given to [*Investor Counsel Name and Address*]]<sup>74</sup>.

(b) Consent to Electronic Notice. Each Investor [and Key Holder] consents to the delivery of any stockholder notice pursuant to the Delaware General Corporation Law (the "DGCL"), as amended or superseded from time to time, by electronic transmission pursuant to Section 232 of the DGCL (or any successor thereto) at the electronic mail address set forth below such Investor's [or Key Holder's] name on the Schedules hereto, as updated from time to time by notice to the Company, or as on the books of the Company. To the extent that any notice given by means of electronic transmission is returned or undeliverable for any reason, the foregoing consent shall be deemed to have been revoked until a new or corrected electronic mail address has been provided, and such attempted electronic notice shall be ineffective and deemed to not have been given. Each Investor [and Key Holder] agrees to promptly notify the Company of any change in such stockholder's electronic mail address, and that failure to do so shall not affect the foregoing.

6.6 Amendments and Waivers.<sup>75</sup> Any term of this Agreement may be amended, modified or terminated and the observance of any term of this Agreement may be waived (either generally or in a particular instance, and either retroactively or prospectively) only with the written consent of the Company and the holders of [at least a majority] of the Registrable Securities then outstanding; provided that the Company may in its sole discretion waive compliance with Section 2.12(c) (and the Company's failure to object promptly in writing after notification of a proposed assignment allegedly in violation of Section 2.12(c) shall be deemed to be a waiver); and provided

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<sup>74</sup> Consider moving the counsel cc address to the schedules for investors, since often more than one.

<sup>75</sup> The composition of the stockholder base should be reviewed carefully when setting amendment and waiver thresholds. In general, rights as to each investor group should be separately waivable by that group.

further that any provision hereof may be waived by any waiving party on such party's own behalf, without the consent of any other party. Notwithstanding the foregoing, (a) this Agreement may not be amended, modified or terminated and the observance of any term hereof may not be waived with respect to any Investor without the written consent of such Investor, unless such amendment, modification, termination, or waiver applies to all Investors in the same fashion (it being agreed that a waiver of the provisions of Section 4 with respect to a particular transaction shall be deemed to apply to all Investors in the same fashion if such waiver does so by its terms, notwithstanding the fact that certain Investors may nonetheless, by agreement with the Company, purchase securities in such transaction)<sup>76</sup> and (b) Sections 3.1 and 3.2, Section 4 and any other section of this Agreement applicable to the Major Investors (including this clause (b) of this Section 6.6) may be amended, modified, terminated or waived with only the written consent of the Company and the holders of [at least] [a majority] of the Registrable Securities then outstanding and held by the Major Investors. [Further, this Agreement may not be amended, modified or terminated, and no provision hereof may be waived, in each case, in any way which would adversely affect the rights of the Key Holders hereunder in a manner disproportionate to any adverse effect such amendment, modification, termination or waiver would have on the rights of the Investors hereunder, without also the written consent of the holders of at least a majority of the Registrable Securities held by the Key Holders.] Notwithstanding the foregoing, Schedule A hereto may be amended by the Company from time to time to add transferees of any Registrable Securities in compliance with the terms of this Agreement without the consent of the other parties; and Schedule A hereto may also be amended by the Company after the date of this Agreement without the consent of the other parties to add information regarding any additional Investor who becomes a party to this Agreement in accordance with Section 6.9. The Company shall give prompt notice of any amendment, modification or termination hereof or waiver hereunder to any party hereto that did not consent in writing to such amendment, modification, termination, or waiver. Any amendment, modification, termination, or waiver effected in accordance with this Section 6.6 shall be binding on all parties hereto, regardless of whether any such party has consented thereto. No waivers of or exceptions to any term, condition, or provision of this Agreement, in any one (1) or more instances, shall be deemed to be or construed as a further or continuing waiver of any such term, condition, or provision.

6.7 Severability. In case any one (1) or more of the provisions contained in this Agreement is for any reason held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, and such invalid, illegal, or unenforceable provision shall be reformed and construed so that it will be valid, legal, and enforceable to the maximum extent permitted by law.

6.8 Aggregation of Stock; Apportionment.<sup>77</sup> All shares of Registrable Securities held or acquired by Affiliates shall be aggregated together for the purpose of determining the

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<sup>76</sup> Note that this parenthetical allows all investors with pro rata rights to vote for a waiver of pro rata rights, including investors who participate in a financing for which such rights are waived. This allows flexibility in structuring future investment rounds, but could result in some investors losing pro rata rights in a round where other investors are participating.

<sup>77</sup> See also Section 6.1 for special aggregation rule applicable to transferees of Registrable Securities.

availability of any rights under this Agreement and such Affiliated Persons may apportion such rights as among themselves in any manner they deem appropriate.

6.9 Additional Investors. Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Series [ ] Preferred Stock after the date hereof, [pursuant to the Purchase Agreement,]<sup>78</sup> any purchaser of such shares of Series [ ] Preferred Stock may become a party to this Agreement by executing and delivering an additional counterpart signature page to this Agreement, and thereafter shall be deemed an “Investor” for all purposes hereunder. No action or consent by the Investors shall be required for such joinder to this Agreement by such additional Investor, so long as such additional Investor has agreed in writing to be bound by all of the obligations as an “Investor” hereunder.

6.10 Entire Agreement. This Agreement (including any Schedules hereto) [together with the other Transaction Documents (as defined in the Purchase Agreement)]<sup>79</sup>, constitutes the full and entire understanding and agreement among the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties is expressly canceled. [Upon the effectiveness of this Agreement, the Prior Agreement shall be deemed amended and restated and superseded and replaced in its entirety by this Agreement, and shall be of no further force or effect.]<sup>80</sup>

6.11 Dispute Resolution. The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [state] and to the jurisdiction of the United States District Court for the District of [judicial district] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [state] or the United States District Court for the District of [judicial district], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

[WAIVER OF JURY TRIAL: EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS, THE SECURITIES OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY

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<sup>78</sup> Without this limitation, the other limitations on subsequent registration rights are effectively moot; confirm and conform appropriately.

<sup>79</sup> It may be appropriate to include if there are side letters or other agreements that cover similar aspects.

<sup>80</sup> Alternatively, if the Prior Agreement is terminated rather than amended and restated, “the Prior Agreement shall terminate and be of no further force or effect and shall be superseded and replaced in its entirety by this Agreement.”

DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.]

[*Alternative 1:*<sup>81</sup> Any unresolved controversy or claim arising out of or relating to this Agreement, except as (i) otherwise provided in this Agreement, or (ii) any such controversies or claims arising out of either party's intellectual property rights for which a provisional remedy or equitable relief is sought, shall be submitted to arbitration by one arbitrator mutually agreed upon by the parties, and if no agreement can be reached within thirty (30) days after names of potential arbitrators have been proposed by the American Arbitration Association (the "AAA"), then by one arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by the AAA. The arbitration shall take place in [*location*], in accordance with the AAA rules then in effect, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof. There shall be limited discovery prior to the arbitration hearing as follows: (a) exchange of witness lists and copies of documentary evidence and documents relating to or arising out of the issues to be arbitrated, (b) depositions of all party witnesses and (c) such other depositions as may be allowed by the arbitrators upon a showing of good cause. Depositions shall be conducted in accordance with the [*state*] Code of Civil Procedure, the arbitrator shall be required to provide in writing to the parties the basis for the award or order of such arbitrator, and a court reporter shall record all hearings, with such record constituting the official transcript of such proceedings.

Each party will bear its own costs in respect of any disputes arising under this Agreement. [The prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.] Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [*state*] having subject matter jurisdiction.]

[*Alternative 2:*<sup>82</sup>

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a

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<sup>81</sup> Some lawyers prefer to include a binding arbitration provision as the sole means of dispute resolution on the theory that arbitration is confidential and may be less expensive and more efficient. Some investors, however, dislike arbitration because the result cannot be appealed, and the arbitrator(s) is not bound to follow case law and precedent.

<sup>82</sup> This arbitration provision is offered as an alternative to the AAA provision for parties that would prefer to resolve disputes under the Delaware Rapid Arbitration Act. The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the DRAA provides for a truncated "summary" proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate. By statute, this proceeding must be concluded no more than thirty (30) days after its initial filing is served, and the jurisdiction of the Court is highly limited. Second, the DRAA divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the DRAA vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is "substantive" or "procedural" does not apply to arbitrations under the DRAA, and neither party can seek to disrupt the commencement of a DRAA arbitration

“**Dispute**”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 Del. C § 5801, et seq. (the “**DRAA**”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “**Arbitration**”) in accordance with this Section 6.11, and each party represents and warrants that it is not a “consumer” as such term is defined in 6 Del. C. § 2731. By executing this Agreement, (i) each party waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in sections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party agrees that it will raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 6.11 and understands that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.<sup>83</sup> To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.<sup>84</sup>

(d) The Arbitration shall be presided over by one arbitrator (the “**Arbitrator**”) who shall be [*insert name of person*]. In the event that [*named person*] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “**Replacement Arbitrator**”). The Replacement Arbitrator shall be [*describe qualifications of the Replacement Arbitrator*]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is

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by running into court. Third, the DRAA vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed, thus avoiding the need for parallel proceedings to compel or enjoin arbitration. Finally, the DRAA provides that, absent an agreement otherwise, all matters must be finally determined within one hundred twenty (120) days of the arbitrator’s acceptance of appointment (which deadline may be extended to one hundred eighty (180) days, but no longer, by unanimous consent of the parties). Furthermore, the DRAA imposes a financial penalty on an arbitrator who does not decide the matter within the allotted timeframe: the forfeiture of the arbitrator’s fees. The DRAA makes challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The DRAA also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

<sup>83</sup> The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this section (b).

<sup>84</sup> The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware. This simply means that Delaware law governs the arbitration, wherever it occurs.

unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.<sup>85</sup>

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.<sup>86</sup>

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.<sup>87</sup>

(g) The arbitral award (the “**Award**”) shall (i) be rendered within [one hundred twenty (120)] days after the Arbitrator’s acceptance of his or her appointment;<sup>88</sup> (ii) be delivered in writing; (iii) state the reasons for the Award;<sup>89</sup> (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;<sup>90</sup> and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section 6.11 shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief;

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<sup>85</sup> The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

<sup>86</sup> The DRAA empowers the parties to include one, both or neither of the provisions set forth in section (e). If the parties wish to proceed without discovery, neither of the sentences in section (e) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The DRAA would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The DRAA contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

<sup>87</sup> The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration.

<sup>88</sup> The parties may specify a longer period for the arbitration. If they do not do so, the one hundred twenty (120) day period of the DRAA is the default, and such period may be extended by no more than an additional sixty (60) days, and then only upon consent of all parties to the arbitration.

<sup>89</sup> A reasoned award is not required by the DRAA, but may be required by the parties’ contract.

<sup>90</sup> The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Section (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator’s award, in which case clause (iv) of section (g) should not be included.

provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.<sup>91</sup>

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,<sup>92</sup> and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, [any third-party discovery proceedings, including any discovery obtained pursuant thereto,]<sup>93</sup> and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.<sup>94</sup> In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half (1/2) of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.<sup>95</sup>

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of res judicata, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

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<sup>91</sup> Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

<sup>92</sup> This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

<sup>93</sup> Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in section (e), above.

<sup>94</sup> Clause (v) would be excluded in the event that third-party discovery was not provided for in section (e) above.

<sup>95</sup> The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

(k) Notwithstanding anything to the contrary set forth in this Section 6.11, if any amendment to the DRAA is enacted after the date of this Agreement, and such amendment would render any provision of this Section 6.11 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 6.11 shall be enforced to the fullest extent permitted by law.

(l) [Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.<sup>96</sup> *[Alternative A:*<sup>97</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>98</sup> The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.<sup>99</sup> *[Alternative B:*<sup>100</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>101</sup> The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.]]

6.12 Delays or Omissions. No delay or omission to exercise any right, power, or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power, or remedy of such nonbreaching or non-defaulting party, nor shall it be construed to be a waiver of or acquiescence to any such breach or default, or to any similar breach or default thereafter occurring, nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. All remedies, whether under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

[Signature Page Follows]

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<sup>96</sup> The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of section (g).

<sup>97</sup> The following is an alternative appellate provision in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA.

<sup>98</sup> In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one (1) or more senior Delaware lawyers.

<sup>99</sup> This provision contemplates a scope of challenge to the Arbitrator's final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

<sup>100</sup> The following is an alternative appellate provision for use in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.

<sup>101</sup> See footnote 98 above.

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Investors' Rights Agreement as of the date first written above.

COMPANY:

*[Insert Company Name]*

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

[KEY HOLDERS:

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

]

INVESTORS:<sup>102</sup>

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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<sup>102</sup> Insert customized signature blocks.

**SCHEDULE A**

**INVESTORS**

**Name and Address**

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

**[SCHEDULE B**  
**KEY HOLDERS]**

**Name and Address**

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

**ANNEX 1**

**CERTIFICATE OF QUALIFIED SMALL BUSINESS STOCK**

[Insert Company Name], a [Delaware] corporation (the “**Company**”) hereby provides the following information to the stockholder(s) named in the table below (the “**Stockholders**”) to assist in their determination of whether the Stockholders(s) may be entitled to certain tax benefits associated with “qualified small business stock” (QSBS) pursuant to Sections 1045 and 1202 of the Internal Revenue Code of 1986, as amended, in connection with the following securities of the Company purchased by the Stockholder(s):

Stockholder	Class/ Type of Stock	Issue Date	Stock [Certificate/Issuance] Number	Number of Shares

<b>Corporate Level Requirements</b>	Yes	No	NA
1. Was the Company a “qualified small business” on each Issue Date? <sup>103</sup>			
<ul style="list-style-type: none"> <li>• Is the Company a domestic C corporation? <sup>104</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>• Were the Company’s aggregate gross assets equal to \$50 million or less as of the Issue Date and immediately thereafter?<sup>105</sup> <ul style="list-style-type: none"> <li>=&gt; Aggregate gross assets shall include cash and the adjusted tax basis of the Company’s other property.<sup>106</sup></li> <li>=&gt; All corporations in the same parent-subsidary control group (defined as more than fifty percent (50%) owned) are treated as one corporation.<sup>107</sup></li> <li>=&gt; The adjusted basis of contributed property does not include any built-in gain at the time of contribution.<sup>108</sup></li> </ul> </li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>• Does the Company agree to any IRS requirements for reporting to the Internal Revenue Service and Stockholders? <sup>109</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Is the Company engaged in a “qualified trade or business”?			

<sup>103</sup> Section 1202(c)(1)(A).

<sup>104</sup> Sections 1202(d)(1) and 1202(c)(2)(A).

<sup>105</sup> Sections 1202(d)(1)(A) and (B).

<sup>106</sup> Section 1202(d)(2)(A).

<sup>107</sup> Section 1202(d)(3).

<sup>108</sup> Section 1202(d)(2)(B).

<sup>109</sup> Section 1202(d)(1)(C). In the case of a corporation’s failure to make a required report, Section 6652(k) imposes a penalty of either fifty dollars (\$50) (or one hundred dollars (\$100) for intentional disregard) for each report with respect to which there was a failure. The penalty may increase if a required report covers periods in two (2) or more years.

<b>Corporate Level Requirements</b>	<b>Yes</b>	<b>No</b>	<b>NA</b>
<ul style="list-style-type: none"> <li>Is the Company engaged in a business <i>other than</i> the performance of personal services, banking, insurance, financing, leasing, investing, farming, extracting or producing natural resources, or operating of a hotel, restaurant, or similar business?<sup>110</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the Company an “eligible corporation”?			
<ul style="list-style-type: none"> <li>Is the Company other than a DISC, a former DISC, a § 936 corporation, a corporation with a § 936 subsidiary, a RIC, a REIT, a REMIC, FASIT, or a cooperative?<sup>111</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.a. Was the Company engaged in an “active business” for substantially all of the taxpayer’s holding period? <sup>112</sup>			
<ul style="list-style-type: none"> <li>Were at least eighty percent (80%) of the value of the assets of the “eligible corporation” used in the conduct of “qualified trades or businesses”?<sup>113</sup> =&gt; If the Company is less than two years old, does the Company meet the eighty percent (80%) test with assets (1) reasonably required for the working capital needs of the business, or (2) reasonably expected to be used within two (2) years to finance research or fund increases in working capital needs? <b>OR</b>, =&gt; If the Company is two (2) or more years old, does “working capital” constitute fifty percent (50%) or less of the corporation’s assets for purposes of the eighty percent (80%) test?<sup>114</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>For all periods did the Company have less than ten percent (10%) of the value of its net assets consisting of stock or securities in other corporations which are not subsidiaries?<sup>115</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <li>For all periods did the Company have less than ten percent (10%) of the value of its assets in real property not being used in the active conduct of a qualified business?<sup>116</sup></li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<sup>110</sup> Section 1202(e)(3). Personal services includes fields such as health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees.

<sup>111</sup> Section 1202(e)(4).

<sup>112</sup> Section 1202(c)(2)(A).

<sup>113</sup> Section 1202(e)(1). Stock and debt equity in any subsidiary corporation (defined in footnote 115) are disregarded and the parent is deemed to own its ratable share of the subsidiary’s assets, and to conduct its ratable share of the subsidiary’s activities (Section 1202(e)(5)(A)). Rights to computer software which produce active business computer software royalties (within the meaning of Section 543(d)(1)) are treated as an asset used in the active conduct of a trade or business (Section 1202(e)(8)).

<sup>114</sup> Section 1202(e)(6).

<sup>115</sup> Section 1202(e)(5)(B). A corporation is considered a subsidiary if the parent owns more than fifty percent (50%) of the vote or value of the corporation (Section 1202(e)(5)(C)).

<sup>116</sup> Section 1202(e)(7).

Corporate Level Requirements	Yes	No	NA
4.b. <b>OR</b> if the “active business” requirement (#4.a.) was not met, was the Company a “specialized small business investment company” licensed to operate under Section 301(d) of the Small Business Act of 1958? <sup>117</sup>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Did the Company avoid redeeming stock from the taxpayer (or a related party) two (2) years before or after the Issue Date of the stock in question? <sup>118</sup>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Did the Company avoid redeeming the stock worth more than five percent (5%) of the total value of the Company one (1) year before or after the Issue Date of the stock in question? <sup>119</sup>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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<sup>117</sup> Section 1202(c)(2)(B).

<sup>118</sup> Section 1202(c)(3)(A). The regulations provide a de minimis exception to this rule allowing stock redemptions up to ten thousand dollars (\$10,000) and two percent (2%) of the stock held by the shareholder (Reg. Section 1.1202-2(a)(2)). Note: Stock redemptions will be disregarded for the termination of services (where such stock was acquired in connection with the performance of services), death, disability or mental incapacity, or divorce (Reg. Section 1.1202-2(d)).

<sup>119</sup> Section 1202(c)(3)(B). The regulations provide a de minimis exception to this rule allowing stock redemptions up to ten thousand dollars (\$10,000) and two percent (2%) of the Company’s stock (Reg. Section 1.1202-2(b)(2)).

IN WITNESS WHEREOF, the Company has executed this Certificate on [*Date*].

[Company Name]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_